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ACTIONS INSTITUTED BY OR AGAINST UNINCORPORATED BODIES

THE legal practitioner who finds himself from time to time concerned in actions on behalf of, or against ' bodies ' (to use a neutral term) which apparently exist and carry on their affairs as units, but which in law are not incorporated, will require no persuading that such ' bodies ' can, and usually do, give rise to very troublesome questions, both in matters of law and procedure. As Scrutton L.J. remarked in *Bloom* v. *National Federation* ((1918) 35 T.L.R. 50), ' an unincorporated association has certain advantages when litigation is desired against them ', and, it may be added, such an association also finds itself in a position of some embarrassment when it, or more properly, its members, desire to institute proceedings. There are, of course, two questions which arise in connection with actions involving such bodies :—

(i) *A question of substantive law, viz.*, whether a cause of action exists which can be asserted on behalf of, or against, all the members of the association as such, and for the benefit of, or against, any common fund of the association. In most cases, this question will fall to be determined under the law of agency.[1]

(ii) *A question of procedure, viz.*, suppose a *prima facie* cause of action exists, who is to be made plaintiff or defendant in the proceedings ?

Of the two, it is perhaps the latter question which gives more trouble in practice, and it is to this question and its related problems that this article will be addressed.

(A) *Suing or being sued by the association as such.*

Some bodies or associations, without being technically incorporate, have had conferred upon them the rights of suing, and being sued, in their collective name. Examples are business partnerships under R.S.C., Ord. 48A, r. 1, and trade unions registered under the Trade Union Act, 1871, s. 6, and there are others which it is needless to enumerate further. Such bodies plainly give rise to no procedural difficulties, but there still remains a very large number of associations of various kinds, aiming at a multitude of differing purposes, ranging from social clubs and charitable institutions to

[1] As to this, see Lloyd, *Law relating to Unincorporated Associations* (1938), *passim*.

trade protection societies, which are devoid of any corporate capacity whatever. This is especially misleading to third parties, because to the outside world they seem to possess just as much collective capacity as any corporation, they appear to occupy premises, own funds, act through duly appointed officers, describe themselves by a collective name and purport to engage in transactions with tradesmen and others under that name. It is only when such transactions give rise to legal disputes and it is desired to institute proceedings, that it emerges that the collective name is a mere facade concealing, but not altering, the hard legal fact that, in law, the association is a mere sum of individuals, without any collective capacity to sue or be sued as such. This has not, however, prevented attempts to sue in the name of such legally non-existent bodies, and some instances are recorded in the reports. In *Grossman* v. *Granville Club* (1884) 28 S.J. 513, an action was brought against an unincorporated club in the club name, and the writ was served on the secretary. It was held that the service was irregular and must be set aside. In *Bloom* v. *National Federation* (1918) 35 T.L.R. 50, a claim against an unincorporated body sued in its own name for work done and goods supplied, was struck out, and Scrutton L.J. uttered the salutary warning that the plaintiff had to make up his mind who was liable before starting the action, and that it was no answer to refer to difficulties which might exist in suing the Federation's officers in a representative capacity. A similar attempt in *London Association for the Protection of Trade* v. *Greenlands* [1916] A.C. 15, was pursued as far as the House of Lords, where a judgment previously obtained against an unincorporated trade protection association under its group name, was set aside, and it was laid down that the point was one of substance, and not a mere procedural technicality which could be waived by an officer of the association entering an appearance on behalf of himself and the other members. If it was desired to adopt this course, leave would have to be applied for under R.S.C., Ord. 16, r. 9 (as to which, see below), and would only be granted if the case came within the ambit of that rule (see *per* Lord Parker, at pp. 38–40). It must be added that, in *Re Pritt* (1915) 113 L.T. 136, where two unincorporated charities were made defendants under their society names, Eve J., while expressing the view that this was wrong and that the proper practice was to sue A.B. (being the treasurer or secretary or other responsible officer of the charity) on behalf of the charity—naming it—and that it should not be sued in its own name, went on to indicate that, if it was so sued, an appearance should be entered by the treasurer, secretary, or other proper officer, on its behalf (see at p. 138). Although this case was not referred to in *Greenlands' Case* (above), this latter proposition must be taken to be overruled, and it would also seem that the representative defendant should be sued, not on behalf of the charity by name, but on behalf of all the members of the charity (see below).

(B) *Suing, or being sued by the members of the association.*

Having decided that the body cannot sue or be sued as such, the next possible line of approach is to sue all the members of the association against whom relief is claimed, or to join all the members as individual plaintiffs. As regards plaintiffs, this is permissible where ' any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative ' (R.S.C., Ord. 16, r. 1), and as regards defendants, where ' the right to any relief is alleged to exist, whether jointly, severally, or in the alternative ' (Ord. 16, r. 4). But this would be a manifestly inconvenient procedure where the body consists of a large number of members, and might be an impossible one where the membership is a fluctuating one. Under this procedure, every member would, of course, have to be individually named, and would have the full status of plaintiff or defendant, entitled to appear and be separately represented, and liable to incur separate sets of costs. This mode of proceeding can, therefore, be dismissed as impracticable in most cases that involve unincorporated bodies.

(C) *Suing, or being sued, by officers of the associations.*

Where it is alleged that one or more officers of the body in question are personally entitled to the benefit, or liable to be sued in respect of the cause of action, there is nothing to prevent them suing, or being sued, by name in their personal capacity. In this case, the parties will not sue, or be sued, on behalf of others, and therefore the action will present no difficulty as to form or procedure (see, *e.g.*, *Steele* v. *Gourley*, 3 T.L.R. 118; *Brown* v. *Lewis*, 12 T.L.R. 455). Any common fund belonging to the association would not, however, be available to satisfy a judgment obtained against individual officers. Such a claim may be joined with a claim in a representative capacity, but care must be taken to state in each case whether the particular plaintiffs or defendants sue or are sued in a personal or a representative capacity (*Hardie* v. *Chiltern* [1928] 1 K.B. 663). If the same individuals sue or are sued in both a personal and a representative capacity, they must not be named twice over on the record, but should be named once, together with a statement that they sue or are sued in their personal as well as in their representative capacity. Moreover, they are not in such a case entitled to double representation by two sets of counsel in respect of each capacity (*ibid.*, at p. 700).

(D) *Suing, or being sued, on behalf of the members of an association.*

This is the form of proceeding known as a ' representative action ', and it is the conditions governing such an action that this article is mainly concerned to elucidate. It is the appropriate form

of proceeding where it is desired to vindicate or assert a right on behalf of or against a large and maybe fluctuating body of persons, whether such persons have formed themselves into an unincorporated association, or have no further connection with one another than in respect of the transaction giving rise to the cause of action. Before examining in detail the circumstances under which such a proceeding is permissible, it is well to emphasise the difference between a representative action and one brought under R.S.C., Ord. 16, r. 1 (see above) where everyone concerned is an actual party to the suit. 'Nothing could be more striking than the contrast between the language of this rule (dealing with representative actions) and that of Ord. 16, r. 1. The reason is obvious. In cases under r. 1 all the parties have the status and responsibilities of ordinary litigants, and the plaintiffs are such by their own consent. In representative actions it is wholly different. The plaintiff is the self-elected representative of the others. He has not to obtain their consent. It is true that consequently they are not liable for costs, but they will be bound by the estoppel created by the decision. The differences from the point of view of the defendant are equally striking. Those in whose behalf the action (so far as it is a representative action) is brought are not responsible for the costs, and are not subject to the ordinary liabilities of litigants in respect of discovery, etc.' (*per* Fletcher Moulton L.J. in *Markt, Ltd.* v. *Knight S.S. Co., Ltd.* [1910] 2 K.B. 1021, at p. 1039). This passage explains why the courts look upon the right to employ the machinery of a representative action as a privilege, enabling one person to bind another by estoppel, without the latter's consent, and have in consequence somewhat jealously circumscribed the conditions under which a litigant will be allowed to avail himself of that privilege. Representative actions were derived from the procedure of the old Court of Chancery, but are now solely governed by the terms of R.S.C., Ord. 16, r. 9, which runs as follows:— 'Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested' (For the almost identically worded County Court Rule, see C.C.R., Ord 5, r. 8.) It is proposed now to examine each element of this rule in the light of such judicial interpretation as it has enjoyed.

(i) *Numerous persons.* This expression seems to have been considered in only one reported decision, where Sargant J. held that a representative order would not be justified where the number represented were no more than five, at any rate unless the sum involved in the action was very small, or the court was satisfied that all the other parties wished the question to be decided in the presence of the one alone (*Re Braybrook* [1916] W.N. 74). The court will not order the names and addresses of the persons on

behalf of whom a representative action is brought to be given, presumably on the ground that this would be oppressive (*Leathley* v. *McAndrew* [1875] W.N. 259).

(ii) *The same interest.* These words are the real gist of the rule, and their construction has given rise to not a little perplexity. It will be noted, in the first instance, that the rule refers to the *same*, and not a *similar* interest. Thus, in *Duke of Bedford* v. *Ellis* [1901] A.C. 1, the plaintiffs, on behalf of themselves and all the other growers of fruit, flowers and vegetables, with various preferential rights to stand in Covent Garden Market, sued the owner of the market to enforce those rights, and it was held that they had a sufficient common interest to maintain a representative action. On the other hand, in *Markt* v. *Knight S.S. Co.* [1910] 2 K.B. 1021, where the plaintiffs, on behalf of themselves and other owners of cargo on a steamship belonging to the defendants, sued for damages for loss of their respective cargoes, it was held that there was no such common interest as to enable the action to be brought in a representative form. Unlike the *Duke of Bedford's Case* (above), the plaintiffs did not have the same interest in the cause; there was nothing to show that the rights of the cargo owners were identical, *e.g.*, their respective cargoes might have been shipped on different bills of lading. There was no common source of right, or common purpose (see *per* Vaughan Williams L.J. [1910] 2 K.B., at pp. 1029–1032). Fletcher Moulton L.J. pointed out that the only circumstances relied upon as amounting to a common interest were that goods had been shipped under similar bills of lading in the same ship, but that, though the claims might be alike in their nature, they were in no way connected, and further that defences might be available against some of the shippers and not against others (*ibid.*, at pp. 1035–1040). 'The proper domain of a representative action is where there are like rights against a common fund, or where a community of people have a community of interest in some subject-matter. . . . To my mind it is impossible to say that mere identity of form of a contract or similarity in the circumstances under which it has to be performed satisfies the language of r. 9' (*ibid.*, p. 1040). Consequently, in the view of Fletcher Moulton L.J., a representative action would not lie where the sole relief claimed was damages, for damages are a purely personal remedy, and the causes of action giving rise thereto are mere independent actions for damages deriving from the same or similar sets of circumstances. In a representative action, the relief sought must not be personal, but beneficial to the class represented as such. Nor could the difficulty be overcome by adding a claim for a declaration that the shippers in question were entitled to damages from the shipowners, for the practice of the court would not permit a plain claim for damages to be split up by isolating an abstract proposition of this kind: each plaintiff would have to prove the whole of his case, and this could

only be done by his being joined as a party under Ord. 16, r. 1 (*ibid.*, p. 1042).

Markt's Case was a claim for damages in contract, but the principle seems applicable *a fortiori* to a similar claim in tort. It was so applied in *Mercantile Marine Service Association* v. *Toms* [1916] 2 K.B. 243, where the defendants were an unincorporated society for the protection of the interests of merchant seamen, and the plaintiffs sued the chairman and other officers on behalf of themselves and all the other members for damages for libel. The society also possessed a common fund vested in trustees and the plaintiffs further sought leave to join the trustees as defendants. It was held that no representative order should be made, and both Swinfen Eady and Pickford L.JJ. pointed out that a representative action had never before been applied to tort, though they conceded that this was not necessarily conclusive. Swinfen Eady L.J. held that a representative action was inapplicable, since the various members of the association might be in wholly different positions and have different defences, as some might rely on non-authorisation, others on the words not being defamatory, and so forth (see at pp. 246–7).

It seems clear, therefore, that if the representative parties are plaintiffs, their rights must derive from an identical source, *e.g.*, a common contract or grant. If they are defendants, their position *vis-à-vis* the claim must be identical in the sense that there must not be different defences available to each or any of them. This would appear to exclude an action for damages based on tort or contract, whether brought on behalf of or against representative parties: in the former case, because each individual would have to prove the damage personal to himself, and, in the latter, because separate defences might be available to the various defendants. (It may be added that this restrictive interpretation of the scope of representative actions may well be partially attributable to their being derived historically from the practice of the old Court of Chancery, where the remedy of damages would not in any case have been available.) But there is nothing to stop a personal claim for damages by named plaintiffs being joined to a representative claim for other relief, provided it is made clear in the former instance that the plaintiffs are suing in their personal capacity (*Duke of Bedford* v. *Ellis* (above)).

It is now proposed to examine these principles by considering separately the cases where the representatives are plaintiffs or defendants.

(a) *Representative plaintiffs.* There must be some common interest arising under the same contract or grant or in respect of a common and identical subject-matter. (It is not, however, necessary that the interest should be proprietary (*Duke of Bedford's Case* (above)): indeed, in most cases, where the interest is proprietary, the claim will be in respect of property vested in trustees,

who will be able to sue, as will appear hereafter, without the need of a representative action at all.) Thus, a claim on behalf of the plaintiff and other owners of a ship against the defendants for freight and dues for the use of the ship was held a good representative claim (*De Hart* v. *Stevenson* (1876) 1 Q.B.D. 313). So, too, a claim on behalf of all the members of a club, except the defendants, against the trustees and committee of the club, alleging breaches of trust, and seeking a declaration and a refund of profits improperly made (*Harrison* v. *Abergavenny*, 3 T.L.R. 324); an action by the trustees of an unregistered friendly society on behalf of themselves and all the members against a former treasurer for money had and received, where the latter was alleged to have converted such moneys to his own use (*Marrs* v. *Thompson*, 86 L.T. 759); an action on behalf of all the bond-holders of a company for an injunction to restrain the company from misapplying a new issue of bonds (*Fraser* v. *Cooper* (1882) 21 Ch.D. 718); an action by one co-contractor on behalf of all the other co-contractors to recover a lump sum premium under a contract made jointly by numerous persons (*Janson* v. *Property Insurance Co.*, 30 T.L.R. 49). (See also *Duke of Bedford* v. *Ellis* (above).)

On the other hand, in *Churchill* v. *Whetnall*, 87 L.J.Ch. 824, where a circular had been sent out by the defendant inviting subscriptions to a fund, and three of the subscribers sued, on behalf of themselves and all the other subscribers, to recover the sums subscribed on the ground of misrepresentation, it was held that no representative action would lie, as there was no common interest, the grievance relied on depending upon facts which might differ in each individual case. 'A dozen different reasons may have prompted favourable replies to the appeal, not one of which would have entitled the donor to a return of his contribution, if he had been a plaintiff in this action' (*per* Eve J. at p. 526). All the contributors might have joined in an action under Ord. 16, r. 1, but in that case each would have had to establish his own right to relief. 'This is really an attempt to obtain relief for over two hundred individuals by proving the right of three of them thereto' (*ibid.*). And, as has been shewn above, damages may not be claimed in a representative action, either in contract, or tort (*Markt's Case*; *Mercantile Marine Association Case* (above)). As regards tort, it is also doubtful whether a representative action is maintainable at all, even if limited to a claim for an injunction (*London Motor Cab Proprietors' Association* v. *20th Century Press*, 34 T.L.R. 68, where the chairman of an unincorporated association sued on behalf of all the members for an injunction to restrain a libel, and Younger J. doubted whether a representative action would lie in such a case, though the case was, in fact, dismissed on other grounds. Cf. also, the dicta in *Mercantile Marine Association* v. *Toms*, cited above). There appears to be no reported case of a representative claim for specific performance of a contract, but in principle there seems no

objection to such a proceeding where there is a common interest derived from a single contract.

The case of *Barker* v. *Allanson* [1937] 1 K.B. 463, referred to hereafter in connection with representative defendants, and which lays down that a contract cannot be enforced in a representative action against an unincorporated body, where the membership of that body has changed between the time when the contract was entered into and when the action was commenced, seems equally applicable to a case where the unincorporated body is itself seeking to enforce the contract as plaintiff by way of representative action. This view is supported by *Jarrott* v. *Ackerley*, 113 L.T. 371, where an underlease was granted to an unincorporated club, and, the headlease being forfeited, trustees on behalf of the club sought relief against forfeiture. It was held by Eve J. that the underlease could only have been granted to the members at the time of the grant, and that as these had since changed, the trustees had no status to sue.

(b) *Representative defendants.* The primary case in which defendants may be sued in a representative capacity on behalf of numerous persons, whether forming an unincorporated association or not, is where it is sought to vindicate some right against a common fund in which all the persons represented have a common interest. Thus, where a society with a common fund incurs a debt under a contract, a representative action will lie to enforce payment of the debt. In *Ideal Films* v. *Richards* [1927] 1 K.B. 374, a representative order was granted for the committee of an unincorporated association to defend an action on behalf of all the members, where the plaintiff was claiming money due for the hire of articles supplied under a contract entered into by the committee on behalf of the members. The association possessed a common fund, vested in trustees, and leave was also granted to join the trustees. The final form of the claim was, therefore, for a declaration that certain sums were due to the plaintiffs from the members of the association, and for an order directing the trustees to pay these sums, together with the costs of the action, to the plaintiffs out of the property and assets of the association in the hands of the trustees, and this form of claim was approved by the Court of Appeal (see *per* Bankes L.J., pp. 377–8). It was also held that it was not generally necessary to bring a second action against the trustees, but that their joinder would not be permitted if it could be shown to give rise to inconvenience or embarrassment (see *per* Bankes L.J., p. 379, and *per* Scrutton L.J., pp. 380–1), though, it is conceived, that this could only be shown in exceptional circumstances : generally, the convenience of confining the proceedings to one action would be all the other way.

This case may be contrasted with *Walker* v. *Sur* [1914] 2 K.B. 930, where a common law action for debt was brought against four named defendants on their own behalf and on behalf of all the

other members of an unincorporated religious society. There was no evidence of any common fund vested in trustees on behalf of the members and the four named defendants were simply ordinary members. It was held that in these circumstances a representative action would not lie. 'It is simply an action of debt against a large number of individuals and no judgment could be obtained which would be representative against all of them; there could only be a judgment individually against each of them' (*per* Buckley L.J. at p. 936). The body of members was itself continually changing and it would be very doubtful whether a judgment against all the members (where no common fund existed), would be against all who were members at the commencement of the action, or at the date of the judgment, or indeed, possibly, at the date when the contract was entered into (see at p. 937, *per* Kennedy L.J.).

The limitations of the decision in *Ideal Films* v. *Richards* (above) were explored in the later case of *Barker* v. *Allanson* [1937] 1 K.B. 463, which merits careful study. In this case there was a claim against the officers of a Lodge of trades-unions, sued on behalf of all the members thereof, for a declaration that the defendants were liable to pay to the plaintiffs a sum of money as the balance of the price of goods ordered many years previously by the then secretaries of the Lodge on behalf of the members, and further for an order that the said sum was payable out of the funds of the Lodge. The majority of the members at the time the goods were ordered and supplied had now ceased to be members, and the majority of present members were not members at that time. There was also no rule of the Lodge which provided for the supply of goods to members. It was held that no representative order could be made, as the various members might have different interests and different defences. *Ideal Films* v. *Richards* (above) was distinguished on the ground that in that case there was no suggestion that the members of the association represented by its committee were not members at the time the articles were hired and supplied (see [1937] 1 K.B. at p. 474, *per* Greer L.J.). Scott, L.J. expressly left open the question whether the decision might have been different if the rules of the Lodge had provided for the purchase of goods by its officers on behalf of the members, and for the payment of such goods being a charge on the Lodge funds, and to be defrayed therefrom at any time regardless of subsequent changes of membership (*ibid.*, pp. 476–7). But, quite apart from the unlikelihood of a society's rules containing an express provision of this kind (which could really be of little benefit to anyone except the society's creditors), it is not easy to see how even such a provision could assist a plaintiff in these circumstances. The only effect it could apparently have, would be either as evidence of a ratification by new members of transactions entered into before they became members, or, possibly, as a novation. A person can, however, only ratify a contract which purported to be made on his

behalf, and moreover the principal must be ascertainable at the date of the contract. (*Watson* v. *Swann* (1862) 11 C.B. (N.S.) 756; *Kelner* v. *Baxter* (1866) L.R. 2 C.P. 174.) Furthermore, there must be evidence that the principal ratified with full knowledge of the facts (*Marsh* v. *Joseph* [1897] 1 Ch. 213), and it seems plain, therefore, that the individual members might have separate defences on the ground of their lack of personal knowledge of past transactions. To spell a novation out of this situation seems equally impracticable, in view of the need to shew a fresh contract between the new members and the contractor (see *Wilson* v. *Lloyd* (1873) L.R. 16 Eq. 60, 74). Nor would it materially assist the plaintiffs to sue representative defendants on behalf of all the members at the date of the contract, for though conceivably a declaration of liability might be obtained against them, it could not be enforced against a common fund now vested in a different set of members. And, in view of *Walker* v. *Sur* (above) it is doubtful whether even a declaration in such a case could be sought by representative procedure.

In principle, it does not seem to matter to what extent the membership has changed between the date of the contract and the writ in the action : even a change of one member might possibly suffice to bring the case within *Barker* v. *Allanson* (above) so that, for practical purposes, a representative action will rarely be available to vindicate a contractual claim against the common fund of an unincorporated society.

It is also clear, as has been already pointed out, that damages for tort cannot be claimed against representative defendants, and this is so even where there is a common fund vested in trustees, and payment of damages is sought from the common fund (*Mercantile Marine Service Association* v. *Toms* [1916] 2 K.B. 243—a claim for damages for libel. This case was followed in *Hardie* v. *Chiltern* [1928] 1 K.B. 663, where damages were claimed for alleged conspiracy). Indeed, it seems reasonably clear that no relief, whether by way of declaration, injunction or otherwise can be obtained in respect of a tort by the procedure of a representative action, as, in such an action, there might always be separate defences available to the various individuals represented. For this reason, and in view of *Markt's Case* (*supra*), there is also little doubt that a representative action will not lie against representative defendants for damages for breach of contract.

A representative action will lie against the officers of an unincorporated association sued on behalf of all the members for a declaration as to the interpretation of regulations binding on all of them in common (*per* Sargant L.J. in *Hardie* v. *Chiltern* [1928] 1 K.B. 663, at p. 669). Apart from this, and the severely limited circumstances dealt with in *Ideal Films* v. *Richards* (above), it is not easy to envisage any other case in which such proceedings would be available against representative defendants. Where it is sought to vindicate a claim in respect of property vested in trustees on behalf

of the members of an unincorporated society, the need for a representative action is completely obviated, as the trustees can be sued direct (see below).

(iii) *May sue or be sued or be authorised to defend.* No leave is necessary to sue as plaintiff in a representative capacity, though the proceedings may be set aside if the case is not one in which a representative action will lie (*Markt's Case* (above)). The position in regard to defendants is less simple. The rule appears to draw a distinction between 'being sued' and 'defending', and this obscurity has not passed without judicial comment. It may be permissible, respectfully, to echo the sentiment of Vaughan-Williams L.J., when he says: 'I do not think I have thoroughly understood what the rule-makers meant by Ord. 16, r. 9' (*Walker* v. *Sur* [1914] 2 K.B. 930 at p. 933). In the same case, Buckley L.J. observed: 'One or more may therefore be sued on behalf of all or may be authorised to defend on behalf of all. If all can effectually be sued, it would be strange if all could not effectually defend. Can the rule mean that while all may be sued by representatives, they cannot defend unless the court gives authority so to do?' (at p. 935). Whatever be the true interpretation of this part of the rule, the usual course is to issue the writ against the representative parties on behalf of all the members of the unincorporate body, and then to apply to the court for an order under the rule that the representative parties be appointed to defend on behalf of all the others (see, *e.g.*, *Mercantile Marine Service Association* v. *Toms* (above)). On this application the court will only grant the order if a representative action will lie in the circumstances of the case, but if a representative action is appropriate, the court may, on the application of the plaintiff, authorise certain individuals to defend on behalf of all persons interested, even against the will of those individuals (*Wood* v. *McCarthy* [1893] 1 Q.B. 775).

(iv) *On behalf of all parties interested.* There are two points for consideration here, the first concerning the representative parties, and the second the parties represented.

(a) The representative parties must fairly represent the parties on behalf of whom they sue or are sued. Thus, in *Parr* v. *Lancs. Miners' Federation* [1913] 1 Ch. 366, the president, treasurer and secretary of an unregistered association, consisting of numerous trade unions, were sued on behalf of all the members. It was objected that the plaintiff should have sued the executive committee and the trustees, but Neville J. held that the parties sued fairly represented the body in question and, therefore, were sufficiently representative to be sued. In *Walker* v. *Sur* (above), however, where four named defendants were sued in an action for debt on behalf of all the members of an unincorporated religious society, the defendants being simply ordinary members, it was held that no order directing them to defend would be made as there was no

evidence of their fitness to represent all the other members (see at p. 934).

(b) The parties represented must constitute a defined *class*, though it is immaterial that it is fluctuating, provided it is possible to determine whether a person is a member of the class (*per* Lord Macnaghten in *Bedford* v. *Ellis* [1901] A.C. at p. 11). But a claim to sue or defend on behalf of *some* members of a class, without defining which, is not enough, nor does it help to add a list of names. Such a list is not a specific class, but a mere collection of individuals, and the class itself must be defined in the writ (*per* Fletcher Moulton L.J. in *Markt* v. *Knight S.S. Co.* [1910] 2 K.B. at pp. 1033–5).

As regards the form of the writ and the pleadings in a representative action, it is only necessary to emphasise that both in the writ and all subsequent pleadings it should be clearly stated that the parties are suing, or being sued, in their representative capacity, on behalf of the members of the defined class (*Ideal Films* v. *Richards* (above); R.S.C., Ord. 3, r. 4). The representative capacity should be stated in the *title* of both the writ and the statement of claim and not merely in the endorsement of the writ or the body of the pleading (*Re Tottenham* [1896] 1 Ch. 628). If the defendants are sued in their personal, as well as their representative capacity, they must not be named twice in the statement of claim. They should be named once only, with a statement that they are sued in both capacities (*per* Lawrence L.J. in *Hardie* v. *Chiltern* [1928] 1 K.B. 663, at p. 700).

A representative plaintiff is *dominus litis* until judgment, and may discontinue or compromise as he pleases; but, after judgment, he loses these powers (see *Re Calgary Co.* [1908] 2 Ch. at p. 659). A representative party authorised to defend cannot consent to judgment: his proper course, if there is no defence, is to submit to judgment (*Rees* v. *Richmond*, 62 L.T. 427).

(v) *Costs.* In a representative action, no order for costs can be made against persons on behalf of whom the plaintiff or defendant is appearing, as such persons are not technically parties to the action, though they *are* bound by the decision (*Price* v. *Rhondda U.D.C.* [1923] W.N. 228), subject to their showing fraud or collusion, or that the court was cheated into believing that the case was fairly fought or that they were fairly represented (*per* Jessel M.R. in *Commissioners of Sewers* v. *Gellatly*, 3 Ch.D. at p. 616).

Where the representative parties are defendants they cannot be made personally liable for the costs unless they are also sued in their personal capacity; an order for costs may, however, be made charging the common fund with this liability (*Ideal Films, Ltd.* v. *Richards*, above). But if the representative parties are plaintiffs and the action fails, it would presumably be a question for the discretion of the court whether the representatives should be made to bear the whole or any part of the costs incurred.

(E) *Action by, or against, trustees.*

Where there exists property vested in trustees on behalf of numerous persons, whether members of an unincorporated society or otherwise, such trustees may sue, or be sued, as representing the property in question, without joining any of the beneficiaries whom the trustees are to be considered as representing (R.S.C., Ord. 16, r. 8). So that, in any proceeding to assert rights in connection with property vested in trustees, the trustees can sue or be sued direct, without any need of the cumbrous procedure of a representative action. Thus, an action to enforce covenants in a lease, or for trespass, in respect of land held by trustees on behalf of the members of an unincorporated body, may be brought by or against the trustees. In such proceedings, the trustees are personally liable, and the beneficiaries cannot properly be made parties thereto, except where the court so orders, in special circumstances, under Ord. 16, r. 8 (*Ramage* v. *Womack* [1900] 1 Q.B. 116; *Halsbury's Laws of England*, Hailsham ed., Vol. 20, p. 361; Vol. 33, p. 197).

All the trustees should join in the proceedings (Halsbury, *op. cit.*, 33, p. 276, and authorities there cited) and they have, of course, a right of indemnity and reimbursement out of the trust property (*ibid.*, pp. 269, 273).[2] The parties' representative capacity as trustees should be stated in the writ, and the pleadings (R.S.C., Ord. 3, r. 4). In the case of a charitable trust, the majority of trustees can, in some cases, sue as representing the whole body of trustees (*Re Whiteley* [1910] 1 Ch. 600).

(F) *Actions by, or against, charitable unincorporated bodies.*

An unincorporated body, which amounts in law to a charity, in addition to being governed by the principles already dealt with in relation to non-charitable unincorporated bodies, is also subject to certain further limitations.

(i) *Attorney-General as a party.* The Crown, *ut parens patriæ*, has the duty of supervising charities, and this function is exercised through the Attorney-General. Consequently, whenever it is necessary to enforce the execution of a charitable purpose, or otherwise to administer a charity, the Attorney-General is a necessary party, usually as plaintiff, and sometimes as defendant (see Halsbury, *op. cit.*, Vol. 4, pp. 372–82). But where the proceedings do not involve the administration or execution of the trusts of the charity, it is not necessary to join the Attorney-General (see, *e.g.*, *Bassano* v. *Bradley* [1896] 1 Q.B. 645, and the other cases cited under (ii) below).

[2] In the case of a members' club, at any rate, there will be no right of recourse against the members personally, in the absence of a club rule permitting this: *Wise* v. *Perpetual Trustee Co.* [1903] A.C. 139. The position is doubtful in the case of other non-trading associations (see Lloyd, *op. cit.*, pp. 137 *et seq.*, where the authorities are examined in detail).

(ii) *Sanction of the Charity Commissioners.* Section 17 of the Charitable Trusts Act, 1853, provides that, before 'any suit petition, or other proceeding . . . for obtaining any relief, order, or direction concerning or relative to any charity . . . shall be commenced', application must be made to the Charity Commissioners for their certificate sanctioning the proceedings. The section concludes with a proviso that it is not to affect any proceeding in which any person shall claim any property or seek any relief adversely to any charity. The interpretation of this section has arisen mainly in connection with disputes between the master and the governors of charitable schools, but the general principle has been laid down that section 17 does not apply to ordinary actions at law, as opposed to suits in equity, and is not intended to interfere with the rights of trustees as owners of property, or as masters employing servants (*per* James L.J. in *Holme* v. *Guy*, 5 Ch.D. 901 at p. 910). In this case, the governors of an endowed school applied for an injunction to restrain the master of the school from occupying the schoolhouse or presenting himself at the school, on the grounds that he was never properly appointed and was unfit to fulfil the duties. It was held by the Court of Appeal that the sanction of the Commissioners was not required. In *Rendall* v. *Blair*, 45 Ch.D. 139, in an action for an injunction by the master of a charitable school, to restrain the managers from dismissing him or ejecting him from the schoolhouse, it was held that, even if the action might incidentally involve consideration of the deed of trust of a charity, the consent of the Commissioners was, nevertheless, not required. Cotton L.J. (at p. 151) expressed the view that section 17 only demanded the consent of the Commissioners where the administration of a trust was in some way required. 'Speaking broadly' (Bowen L.J. observed at pp. 152–3) 'I think that this section does not deal with or touch actions which are brought to enforce common law rights, whether such rights arise out of contract or out of tort—or out of common law duty, I ought rather to say. I think also that it does not apply to suits by individuals whose object is solely to obtain equitable relief in respect of common law rights'. Fry L.J. also pointed out that a suit to enforce an individual equitable right not relating to the administration of the trusts of the charity would also not be within the section (at p. 160). In *Bassano* v. *Bradley* [1896] 1 Q.B. 645, trustees of a charity were held to be entitled to sue for arrears of a rentcharge issuing out of the defendants' land, without the sanction of the Charity Commissioners.

On the other hand, where the plaintiff's claim is as an 'object' of the charity, and amounts to a claim to share in the benefits of the charity or to be a recipient of part of the proceeds thereof, the consent of the Commissioners is necessary (see *Benthall* v. *Kilmorey*, 25 Ch.D. 39; *Brittain* v. *Overton*, 25 Ch.D. 41 (n); *Rooke* v. *Dawson* [1895] 1 Ch. 480). Where an injunction is claimed, the operation of which would necessarily be to regulate or interfere with

the administration of a charity, but the claim for an injunction is merely ancillary to a common-law claim for damages, the consent of the Commissioners is still requisite (*Falconer* v. *Stearn* [1932] 1 Ch. 509). If an action is started in a case where the consent of the Commissioners is necessary, it need not be obtained before commencement of the action, and the action will not be dismissed without the plaintiff being given an opportunity to apply for consent (*Randall* v. *Blair* (above)).

Certain charities, it should be added, are also exempt from the jurisdiction of the Commissioners (as to these, see section 62 of the Charitable Trusts Act, 1853).

(iii) *Official Trustee of Charitable Lands.* In certain circumstances, the legal estate may be vested in the Official Trustee of Charitable Lands, who is a corporation sole (see sections 47–8, Charitable Trusts Act, 1853). But, subject to any order of the court, he is deemed to be a bare trustee, and the trustees of the charity still retain possession, management and control of the trust estate (*ibid.*, section 50). Consequently, it appears that, in any action which does not specifically relate to the vesting of the legal estate, the trustees could sue and be sued without joining the Official Trustee. This would presumably extend to, *e.g.*, an action for trespass, which is based on possession or a merely possessory title. But an action involving proof of legal title, *e.g.*, ejectment brought against a trespasser, where no estoppel, as would exist between a tenant and his landlord, arises, would seemingly require the joinder of the Official Trustee.

(iv) *Official Trustees of Charitable Funds.* These trustees constitute a corporation (Charitable Trusts Act, 1925, s. 1), and charitable funds may in certain circumstances be vested in them (Charitable Trusts Act, 1853, s. 51). There is no comparable provision to s. 50 (of Charitable Trusts Act, 1853) so that it seems that the Official Trustees would be necessary parties to any action relating to such funds.

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THE PROBLEM OF A LAW OF PROPERTY IN GOODS

All systems of law distinguish between the law of property and the law of obligations. The distinction is not the same as that between rights 'in rem' and rights 'in personam' since some violations of property rights give rise to personal remedies and some obligations may in effect be enforced 'in rem' by injunctions and similar devices.[1] It is not easy to define precisely what rights are rights of property, but it is easy to describe the type of incidents which a law of property possesses. A law of property usually entails specific recovery of the 'res', 'tracing' of title either by documents or public records, incumbrances enforceable specifically against the 'res', or restrictions on user which are similarly enforceable. The law of real property possesses all these incidents. The law of property in chattels is deficient on all these points, so that, save for the purposes of universal succession on death or bankruptcy it may hardly be said to be a law of property at all. The reasons for this difference are historical as much as practical, and it is interesting to consider whether we have as yet reached a stage of legal development where the rudiments of a real law of property in goods exist.

The common law failed to develop distinctly proprietary remedies for the recovery of goods. In the Middle Ages live stock were almost the only chattels of real value and such chattels were intimately connected with the land. Land was permanent and identifiable, goods transitory and easily concealed from discovery. Hence the land law gave actions which determined the title to land which were distinct from and older than the actions which were grounded on interference with land. By the time the action of trespass in ejectment, a tortious remedy, had become the usual remedy of the claimant to land the rules of land law were familiar and the idea of property in land well entrenched.[2]

In the case of chattels the identification of remedies for their recovery with the law of tort came too early for the property aspect to survive. In the early common law there were actions by which chattels could be specifically recovered. Cattle could be recovered by an interlocutory proceeding in replevin where they had been the subject of unlawful distress.[3] Ancient notions of self-help survived

[1] Stone, *Province and Function of Law*, 128.

[2] Holdsworth says, in regard to the action of ejectment (vol. 7, p. 17): 'Since it was employed to assert the title to the freehold the rules as to the matters to be proved by the plaintiff and the defences open to the defendant necessarily depended upon the substantive rules of the law of real property which had grown up round the real actions'.

[3] 2 Pollock & Maitland 525.

in the remedy of recaption of chattels, a remedy which must often have been exercised but on which there is little reported authority.[4] Specific recovery of chattels was the original object of the action of detinue.[5] As early as the thirteenth century it was the practice to claim for the price of the goods as an alternative, in case the defendant had lost or destroyed the goods themselves. Since the defendant was given the option of payment or return it was realised that detinue hardly qualified as a true ' real action '.[6] Detinue, therefore, lost its original character and became an action in tort for damages for the detention of goods, in which the value of the goods was simply the basis of damages. The small local courts gave specific relief more liberally than the royal courts until they became obsolete.[7] There was an occasional award of specific relief in the Court of Chancery.[8] In 1878 an action of detinue was classified as an action of tort,[9] but this case turned on a statute which assumed that all actions were for tort or breach of contract,[10] and should not carry too much weight. The recent case of an action for possession of land by a husband against a wife may serve as a warning.[11] There the husband failed because this action is in form one of ejectment, which again is a form of direct trespass, and therefore an action of tort not authorised by the Married Women's Property Acts. As we have seen, this does not cast any doubt on the existence of a law of real property. By the seventeenth century detinue, which laboured under procedural disadvantages in those times, was largely superseded by trover or conversion. Trover was an action on the case for damages and clearly tortious in nature. Where it was brought for the value of goods that value was merely one form of damages, and damages might be quite different from the value of the goods.[12] The general use of trover completed the submersion of the law of property in goods in the law of tort. Where the title to goods had passed under a contract of sale it was usual to sue in contract for non-delivery and not for detention.[13] The differences between ' seisin ' and ' possession ' of land which distinguished such remedies as trespass from real actions did not survive in the case of goods, although there is evidence that ' seisin ' of chattels was conceived of.[14] Thus the ' title ' to goods was only relevant as a circumstance in some action based on contract or tort, and it was the whole group of circumstances which determined the result of

4 See Branston (1912) 28 L.Q.R. 262. This remedy seems to require leave of the court under the Courts (Emergency Powers) Act, 1943, s. 1 (2) (*a*) (ii).
5 2 P. & M. 174.
6 Bracton, f. 102b.
7 Maitland, *Court Baron* (IV Sel.Soc.), 115.
8 *Select Cases in Chancery*, X Sel.Soc. 36, A.D. 1425.
9 *Bryant* v. *Herbert* (1878) 3 C.P.D. 389.
10 *Per* Bramwell L.J. at 390.
11 *Bramwell* v. *Bramwell* [1942] 1 K.B. 370.
12 Holdsworth, vol. 7, 403.
13 As now in the Sale of Goods Act, 1893, s. 51.
14 Ames (1890) 3 Harv.L.R. 23; Maitland (1885) 1 L.Q.R. 324.

the action, and not the fact of 'title' itself. References to 'true owners' and to the problem of pleading a better right in a third person are misleading. No court could say who the absolute owner was, unless the case concerned, say, a sale of timber by a vendor who brought his title deeds to court, or the plaintiff showed a title in market overt with evidence as to the identity of the goods, neither of which would normally be done. The courts concerned themselves only with older and younger possession, with persons whose rights were better than those of other persons, and in many cases it was obvious that the 'true owner' was not before the court.[15] Title to chattels was not traceable but one individual could recover them or their value from someone who had a weaker right than he.

Are there any indications that the attitude of the law is changing in this connection? It is suggested that there are some signs of a substantive law of property in goods, although the legacy of the past is too heavy to permit of a fundamental review of traditional classifications. One of these signs is the recrudescence of the despised action of detinue. Detinue has long ago lost its procedural handicaps and is now as useful as trover. Despite its days in the shadow it never quite lost its historical identity. After the forms of action had been 'abolished', as it was thought, lawyers still spoke of 'detinue' when they referred to actions where plaintiffs claimed, however despairingly, specific delivery of their goods. Order 48 of the Rules of the Supreme Court now provides for the attachment of the defendant where he disobeys an order for specific delivery of chattels,[16] which may be made without giving him the option of paying damages.[17] In a case before McCardie J.[18] a judgment of a county court had originally given the defendant an option to pay the value or return the goods. He failed to do either and a warrant of delivery was then issued from the county court with no option to pay the value, and this procedure was upheld. Payment into court is no defence in detinue since it assumes that the court will not decree specific delivery.[19] The effect of Order 48 is to restore the ancient character of detinue, even if specific relief is not always ordered. In normal times it is unnecessary but in times of extreme shortage of consumer goods it is more difficult for a defendant who still retains goods to tell the plaintiff to take the damages and buy in the market.[20] Coupons further complicate the picture today.

Several statutes have conferred a special jurisdiction to award specific delivery of goods. Perhaps the most important is the Sale

[15] *Armory* v. *Delamirie*, 1 Smith L.C. (13th) 393; *The Winkfield* [1902] P. 42.
[16] Cf. *Hymas* v. *Ogden* [1905] 1 K.B. 246 (C.A.).
[17] Since Common Law Procedure Act, 1852.
[18] *Bailey* v. *Gill* [1919] 1 K.B. 41.
[19] *Allan* v. *Dunn* (1857) 1 H. & N. 572.
[20] *Whiteley* v. *Hilt* [1918] 2 K.B. 808.

of Goods Act, 1893,[21] where the remedy is part of the general action for breach of contract and no special claim in detinue is necessary. The Hire-Purchase Act of 1938 is another example.[22]

Stolen property may be recovered in specie, where the thief is convicted, under the Larceny Act, 1916,[23] and under the Police (Property) Act of 1897.[24] Finally, there is a very important summary jurisdiction to decide title to chattels as between a husband and wife.[25] Orders for delivery of chattels may be made by the court in this case, and are commonly used in cases of furniture and other household goods.

In the last year or two the courts have spoken with two voices on the question of measure of damages in detinue. The Court of Appeal had, in *Rosenthal* v. *Alderton*,[26] to assess the value of goods in an action of detinue. It was argued that the cause of action arose when return was refused, and that the value of the goods must be assessed at the date of the wrong thus committed. But Evershed L.J. pointed out that the plaintiff in detinue still maintains his ownership until the court orders payment of money, and therefore the value must be assessed at the time of the judgment.[27] This decision is an extremely hopeful one, so far as legal theory is concerned. Unfortunately it has not been welcomed by all the judges. In a later Court of Appeal decision its operation was limited to the case of a recalcitrant defendant who retains the goods but will not restore them.[28] In this latter case there had in fact been a conversion of which the plaintiff was aware. As he could have reacted promptly the court considered the rise in value of such goods since that date as not fairly the fault of the defendant. The plaintiff had himself been responsible for the difference since he could have bought such goods for less money at the time he learned of the conversion. Just as a plaintiff may not waive a conversion so as to pick his own time to demand return and thus evade being statute barred,[29] so he may not bide his time after a conversion so as to make his demand when the market price is highest.

Denning L.J. has also criticised the principle of *Rosenthal* v. *Alderton* on more general grounds.[30] The learned judge considered this an anomalous exception to the general rule that damages should

21 Section 52: 'In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages'.

22 Section 12 (4). On the hearing of the action the court may make an order for the specific delivery of the goods to the owner.

23 Section 45.

24 An example is *Marsh* v. *Commissioner of Police* [1945] K.B. 43.

25 Married Women's Property Act, 1882, s. 17.

26 [1946] K.B. 374; followed in *Munro* v. *Willmott* [1949] 1 K.B. 295.

27 He referred to Holdsworth, vol. 7, p. 439.

28 In *Sachs* v. *Miklos* [1948] 2 K.B. 23.

29 Limitation Act, 1939, s. 3.

30 In *Beaman* v. *A.R.T.S., Ltd.* [1948] 2 All E.R. 89, reversed on other grounds [1949] 1 K.B. 550.

be assessed at the time the cause of action arose. Such an argument simply reinstates the tortious view of these actions at the expense of any real proprietary character.

The common law lacked any theory of a prescriptive title to chattels. In the case of land the expiration of the period of limitation destroyed the title and not merely the right of action of the former owner.[31] The present statute assimilates the rules of chattels to those of land and extinguishes the title of the old owner completely.[32] This enactment is another prop for a 'proprietary' theory of chattel ownership.

An interesting example of the vacillation between proprietary and personal theories in chattels arises under the law of patents and of copyright. We are not concerned here with the incorporeal rights of the owners of patent or copyright but only with corporeal chattels which infringe such rights. On the one side the Copyright Act, 1911,[33] expressly enacts that infringing copies become the property of the owner of copyright who is given an action of trover or conversion against the defendant for any profit he makes with such copies. This is a rare example of a primary title to property in English law and paradoxically it applies to goods which the owner has probably never seen. Interesting problems may some day have to be solved where third parties supply materials for work which turns out to be an infringement. It is not thought that the courts will generalise from this section. So far they have tried to assimilate the remedy in conversion more closely to the special law of copyright by refusing to apply the normal rules of limitation of actions which apply to conversion.[34] On the other hand, we have the problem of infringing copies of articles which are protected by patents. Here the courts have insisted that the remedy of delivery-up of such articles to the patentee is discretionary and will only be ordered where necessary for his protection.[35] In a case where it was argued that the existence of this remedy affected the title to the articles[36] Lord Esher held, 'It is argued that, inasmuch as there has been an infringement of the patent, the property is not in him because the court may order the shells to be destroyed. The patent law has nothing to do with the property. I am clearly of opinion that the patent law did not prevent the property from passing'.

These problems arise on the borderline of property and tort but similar problems arise on the borderline of property and contract. Where an infant fails to pay the hire for goods he can be compelled to restore them and even to pay their value if he converts them.[37] But the basis of this decision is that the act of converting the

31 This rule is now re-enacted in the Limitation Act, 1939, s. 16.
32 Limitation Act, 1939, s. 3.
33 Section 7.
34 *Caxton Publishing Co.* v. *Sutherland Publishing Co.* [1939] A.C. 178.
35 *Mergenthaler Linotype Co.* v. *Intertype, Ltd.* (1926) 43 R.P.C. 381.
36 *Vavasseur* v. *Krupp* (1877) 9 Ch.D. 351.
37 *Ballett* v. *Mingay* [1943] K.B. 281.

goods goes beyond 'the contract of bailment' and amounts to an independent tort. Such reasoning appears to miss the fact that an infant may be liable as bailee although not normally liable in contract,[38] and that the form of action in fact used was detinue and not conversion. A much more satisfactory modern decision clearly distinguished between contract and property.[39] Goods were sold on hire-purchase terms for a price which violated price restrictions imposed under controls. The hirer argued that he could retain the goods without payment on the ground that the owner could not go to court and rely on an illegal transaction. The Court of Appeal held that the enforcement of the contract was in no way involved; it was simply a claim for the return of property. 'It is not', it was held, 'a general principle or rule that when one man's goods have got into another's possession, in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious'. The plaintiff recovered his goods. Emergency legislation led to a similar issue in a hire-purchase case where the owner retook his goods without leave of the court.[40] Although the court held that an action on the case for damages would lie at the suit of the hirer it pointed out that he could not recover in detinue or conversion since he had defaulted with his payments and lost his 'right' to retain the goods, quite independently of the fact that the owner had done wrong in using self-help.

A common example of the superior nature of the law of real property is the possibility of imposing restrictions on user which bind third parties. It is generally said that in the case of goods the only remedy is in contract, and that nothing like a restrictive covenant exists.[41] But there is a large class of goods of which this is not true. It is always possible to impose restrictions on the use of articles protected by a patent.[42] A number of significant exceptions have also been made by the trade mark laws.[43] Certain acts may be forbidden, such as the mutilation of trade marks on goods, and the section goes on to say that 'any person who, being the owner of the goods and having notice of the obligation, does that act shall be deemed thereby to infringe the right to the use of the trade mark given by the registration thereof, unless that person became the owner of the goods by purchase for money or money's worth in good faith before receiving notice of the obligation or by virtue of a title derived through another who so became owner

[38] *R.* v. *Macdonald* (1885) 15 Q.B.D. 323.
[39] *Bowmakers* v. *Barnet Instruments* [1945] K.B. 65.
[40] *Carr* v. *James Broderick & Co., Ltd.* [1942] 2 K.B. 275, under the 1939 Act, now the Courts (Emergency Powers) Act, 1943, s. 5.
[41] *Dunlop* v. *Selfridge* [1915] A.C. 847.
[42] *Incandescent Gas Light Co.* v. *Cantelo* (1895) 12 R.P.C. 262.
[43] Trade Marks Act, 1938, s. 6.

thereof '. The analogy to the law of real property (before 1926) is close. Restrictions on sale prices are not covered by this enactment but by indirect means these and other restrictions are effectively enforced.[44]

By means of equitable remedies effective control can also be exercised in other cases as by injunctions to restrain breach of contract. In recent years a number of interesting practices of this kind have grown up. Thus, books may be circulated among borrowers without putting them on the market at all, and in some cases the borrower may be required to undertake not to divulge their contents. If he should do so an action for damages would be unprofitable but an injunction might be obtained or even specific redelivery of the book ordered. This jurisdiction is rather part of the law of contract than the law of copyright,[45] and the duty of secrecy was thus explained.[46] ' There is another class of cases concerned with the right to prohibit publication, not on the strength of the proprietary right but because of a confidential relation which may make unlawful not merely the publication of the letters but any communication of their contents to third persons '. In such cases it seems there may not be a ' publication ' for the purposes of the law of copyright strictly so-called.[47] Manufacturers of various articles, *e.g.*, some business machines, make it a practice not to sell them but to hire them out exclusively to their own trained operators. They claim that this preserves the goodwill of their equipment, and prevents second-hand dealings and use of equipment by untrained operators. Here, again, the ' hirer ' has no title to sell, and unauthorised loans and the like may be made a ground for termination of the hire.

Apart from the law of bills of sale, which has not been prominent in recent cases, there is nothing resembling a register of title to goods. Even the system of registration of motor vehicles serves different purposes and the licensee may not be the owner.[48] Racehorses and greyhounds are privately registered. Cameras, field-glasses and other valuable chattels may bear identification numbers but these are designed for different purposes, such as convenience of invoicing, inventorying, claims for defects and the like. Limited editions are sometimes numbered and valuable paintings and antiques may be traced through sale and exhibition catalogues and probate inventories. None of these methods approximates actual tracing of title. On the other hand, the combined effect of all these innovations cannot have been completely lost. In fact, it is now

[44] *Thorne* v. *Motor Trade Association* [1937] A.C. 797 gives one form used. Cf. *B.M.T.A.* v. *Salvadori* [1949] 1 All E.R. 208.
[45] *Exchange Telegraph Co., Ltd.* v. *Central News, Ltd.* [1897] 2 Ch. 48.
[46] By Kekewich J. in *Philip* v. *Pennell* [1907] 2 Ch. 577.
[47] Copyright Act, 1911, s. 1 (3).
[48] In *Joblin* v. *Watkins* [1949] 1 All E.R. 47 it was emphasised that a car registration book is not a document of title.

easier to trace and identify chattels of great value. This removes some of the justification for the cavalier attitude towards chattel titles, and makes it possible to think seriously of tracing title as a matter of law.

Recent legislation has made drastic inroads on the form of the law of real property and the beneficial content of land ownership. It is felt that this, together with the shortages of goods with which we are faced for some time to come, warrants a more serious study of the theory of ownership of chattels, and a more scientific form of proprietary remedy liberated from the trammels of either the personal obligation of contract or the culpable liability of tort.

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THE SO-CALLED LIEN OF A PARTNER

WHETHER or not it was Lord Hardwicke who first described as a 'lien' the partner's right to have the debts of the firm paid out of partnership property in priority to the distribution of the shares of the partners themselves, this expression has come in for much judicial criticism. So far as the present law is concerned, the word 'lien' nowhere occurs in section 39 of the Partnership Act, 1890, which defines the right in question as follows :—

> '39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the court to wind up the business and affairs of the firm'.

The section, it is to be observed, declares a right (a) arising only on the dissolution of the partnership, and (b) applying only to partners, in that capacity, against partners in a like capacity (or those claiming through them), to have the partnership property applied in a particular way. The property is to be twice screened : first, with a view to arriving at a general surplus, by eliminating the debts and liabilities of the firm; and then, with a view to ascertaining each partner's particular share of that surplus, by adjusting their own respective liabilities as partners of the firm. Machinery is thereupon provided for putting this right into operation.

That is the right which is called a 'lien'.

It is certainly not a legal lien, the essence of which is the right to detain a chattel from its owner as security for a particular indebtedness, and which is lost as soon as possession of the chattel is for any reason surrendered. It is thus defined in *Chitty on Contracts*, 20th ed., pp. 1151, 1152 :—

> 'A lien at common law is a personal and incommunicable right, which may be defined as a possessory interest in a specific chattel, arising by implication of law, as distinguished from express contract, either out of the right of a person to remuneration for work executed or services rendered on or in connection with the fabric or substance of the chattel, or else by reason of the indebtedness of the owner to the person having the custody of the chattel'.

As distinct from this, equity creates a lien in the nature of an automatic mortgage or charge which attaches to the property of another, not necessarily in the possession of the person in whose favour it operates, to secure payment of money owing to that person in relation to that property. A common example of an equitable lien is that of an unpaid vendor who has parted with possession of the property sold, but has nevertheless a lien in the nature of a charge on it for the purchase price. Another example is that of trustees who have a lien on both capital and income of the trust property for all costs and expenses properly incurred in the execution of the trusts (*Stott* v. *Milne*, 25 Ch.D. 710, 715); and, again, there is the lien of a beneficiary on security on which trust money has been advanced by the trustees, who have been ordered to replace the fund on the ground of the insufficiency of the security. (*Re Whiteley*, 33 Ch.D. 347; 12 App.Cas. 727.)

Thus, unlike the lien at common law, the equitable lien is neither merely a personal right nor one which is bound up with possession or continued possession of the property to which it attaches. Apart from agreement, the only way of shaking it off is either by satisfaction of the obligation on which it is founded or by the unequivocal substitution for it of other security. Speaking in particular of the vendor's lien (though the observation may aptly be applied to equitable liens in general) Cozens-Hardy L.J. said :

> ' Now it is quite settled that a vendor's lien is not a mere personal equity, and that it really creates a charge upon and an interest in the property sold, in the same manner as if that charge had been created by writing '. (*Re Stucley* [1906] 1 Ch. 67, 83.)

It is to the equitable lien that the partner's right under discussion has been likened. The resemblance is seen in the operation of the right as a fetter upon the distribution of partnership property until certain obligations have been discharged. But there the analogy strictly ends. Whereas an equitable lien attaches to the property of another to secure what is payable to oneself, the right of a partner attaches to what is partly his own to secure payment to another of what is contingently due from the partner himself. The essence of a charge (and therefore of an equitable lien) is to graft upon property a temporary interest which is intended to be released so soon as a particular and independent obligation has been performed. Whereas a partner's right operates rather as a trust designed to keep a fund in being until it has been ascertained what part of the fund itself permanently belongs to each individual partner.

Long before the law was codified in the Partnership Act, 1890, the nature and scope of this lien-like right of partners was frequently discussed in the courts.

In 1848, the case of *Green* v. *Briggs* (6 Hare 395, 401; 67 E.R. 1219, 1222) came before Wigram V.-C. It was a case in which the

right of a part-owner of a ship to be reimbursed out of the gross freight the amount of expenses incurred in the prior repair and outfit of the ship was in issue. The Vice-Chancellor, in holding that the gross earnings of the ship were liable to such expenses, said :

> ' It is, of course, immaterial by what form of expression the plaintiff's claim is described provided the sense of the expression is clearly defined and understood. But when a word such as " lien " (having a technical meaning) is used in a case like the present, there is danger of importing into the consideration of the case argument which, though strictly applicable to the law of " lien ", in its proper sense, may not properly belong to the subject in hand. I cannot but think that, upon cross-examination of the defendants' witnesses, much of the apparent force of their evidence might have been found to depend upon the meaning they have attached to the word " lien ". However, that the precise grounds of my judgment may appear, I shall drop the word " lien ", and consider the question to be, what in principle it is, and what the prayer of the bill makes it, a question whether the owners of 7/8ths are entitled to the gross freight now in hand, or only to the net freight, after defraying the expenses of earning it '.

Warning of a narrower distinction still was given in 1856 by Romilly M.R. in *Kay* v. *Johnson* (21 Beav. 536; 52 E.R. 967), where attention was drawn to the difference between the lien which partners have upon the joint property in all cases for the repayment to them of advances made by them to the firm, and the very limited circumstances in which mere co-owners (that is, persons not trading with the property that they own in common) can claim a lien for money spent by them on their common property. (See also *Re Leslie*, 23 Ch.D. 552, and *Re Smith's Estate* [1937] Ch. 636.)

In 1858, Romilly M.R. went more deeply into the subject in the course of his judgment in *Payne* v. *Hornby* (25 Beav. 280, 285–7; 53 E.R. 643, 646).

> ' Now I apprehend ', he said, ' the rights of partners to the partnership assets, upon a dissolution, or upon the decease of a partner, are quite distinct from those of a lien or a mortgage in the ordinary sense of the term. There may be a mortgage or a lien on the stock-in-trade, that is a matter which is quite distinct from the rights which a partner has on the ordinary partnership property. . . . I take the great distinction to be this : in the case of a lien or a mortgage, the lien remains on the stock-in-trade through all its variations and changes; so that if a person in business, who is constantly renewing and changing his stock-in-trade, gives a mortgage on all his stock-in-trade, it does not prevent him from selling any portions of it and acquiring fresh, but the mortgage subsists on the constantly changing stock-in-trade, such as it may be from time to time. But on the death of a partner, I apprehend there arises a right of a totally separate and distinct character; it is, I think, as Lord Eldon very accurately expresses it " *a quasi lien* "; it is, in point of fact, a right to the property in

the thing itself; his executors, in respect of his right, are joint tenants with the surviving partners, and, accordingly, they are entitled to say to the surviving partners, " You cannot sell a single article of the stock-in-trade without our consent or permission. You can do one of two things; you may either wind up the concern at once or you may settle what is the value of the testator's property, and pay or secure the payment of that to us, in which case you may go on with the trade ".

' The surviving partner may, by arrangement, give the executors a mortgage on the partnership stock, in which case they acquire the usual rights of mortgagees to the stock subsequently acquired, but if this be not done, the mere fact that their testator was a partner at the time of decease does not give them that lien.

This is easily exemplified by what is constantly taking place in this court on a dissolution of partnership, either by death, lunacy, effluxion of time, or any other cause. If the executors say to the surviving partner, " We insist upon this being wound up immediately ", and the surviving partner hold them at arm's-length, refuse to entertain any proposal and goes on with the business, the executors have no remedy but to come to this court; and in that state of things this court appoints a receiver to get in all the partnership property, and the partnership is wound up under the direction of the court. The court frequently appoints one of the partners to be a receiver, but it thereby makes him an officer of the court, because he understands the affairs better than any other person. If the executors file a bill for winding up the partnership, but do not apply for a receiver or an injunction, I apprehend that if a variation takes place in the stock and goods while the business is carried on by the surviving partner alone, and fresh goods are brought into the business, and he becomes bankrupt, they belong, in the first place, to the creditors who have been created by the subsequent dealing, and not to the creditors of the old partnership; for it was the duty of the creditors, in that case, to come here at once to obtain a receiver and prevent that course of dealing from going on. If it were not so, it would be sanctioning the commission of a fraud against all subsequent and separate creditors, who would be acting under the belief that they were dealing with a person who would be able, from his stock-in-trade, to pay their debts, but who, in truth, had no stock of his own '.

Although, of course, Romilly M.R. was not there concerned to discuss the law more extensively than was necessary for the decision of the issue before him, the passage just cited does illustrate the broad distinction between the floating nature of an equitable charge upon the property of another and the merely restrictive effect of the partner's right, on a dissolution, to keep in being what includes property of his own. The Master of the Rolls actually says (*ibid.*, p. 286) : ' . . . it is, in point of fact, a right to the property in the thing itself '; and the corollary to that right he himself

illustrated in one of his earlier judgments delivered in 1855 (*Re Langmead's Trusts*, 20 Beav. 20, 25, 26; 52 E.R. 509, 511), in saying : ' I think that the case of the petitioner cannot be put higher than one of an express trust vested in William Langmead, to sell the property and apply the proceeds in payment of the debts of the partnership '. The petitioner there represented the estate of a deceased partner, and William Langmead was the surviving partner. The position was, therefore, that, the deceased partner, having a proprietary interest in the assets remaining in the hands of the surviving partner, the latter became, upon the dissolution of the partnership a trustee of that interest for the estate of the former, and as such, charged with the duty of doing everything necessary to enable the amount of that interest to be ascertained and made available for payment over.

About half a century later this was made perfectly plain in *Re Bourne* [1906] 1 Ch. 113, 118, by Farwell J., and underlined in the same case on appeal ([1906] 2 Ch. 427, 434) in even clearer language by Fletcher Moulton L.J.

What Farwell J. said was :

> ' I observe that Lord Lindley in his treatise, when speaking of the lien which each partner has on the property of the firm, calls it " this right, lien, quasi-lien, or whatever else it may be called ", and I think that the argument of counsel on behalf of the executors of the deceased partner is founded on a misapprehension of the nature of this right, by treating it as though it were in fact an equitable mortgage security. The right is as stated in the Partnership Act, and it cannot be put higher, as Lord Romilly says, than a trust to realise and pay the debts, with, of course, a receipt clause '.

In the Court of Appeal, Fletcher Moulton L.J. amplified this explanation in these words :

> ' I cannot help thinking that a great deal of confusion in this case has arisen from the phrase that a deceased partner has a lien on the surplus assets of the firm. I doubt whether " lien " is the word which best describes his right. It is not a lien on any specific property existing at the date of the death such as would fetter its realisation or conversion into money, but the right is really a claim against the surplus assets after realisation, whether those surplus assets consist entirely of the proceeds of realisation or whether they include some specific property which existed at the date of the death. As soon as you get your surplus, the lien attaches. Until you get your surplus there is no claim or lien which in any way affects the power and duty of the surviving partner to realise the property of the partnership, and to discharge its liabilities '.

The ' power and duty of the surviving partner ' there mentioned is Lord Romilly's ' trust . . . to sell the property and apply the proceeds in payment of the debts . . . '; and although in the one case it is regarded as arising before the partner's so-called lien attaches and in the other as a necessary corollary of the outgoing

partner's claim, the difference is really only one of approach and not of substance, since in either case the right vests on the dissolution of the partnership, and in neither does it attach effectively to ascertained property until the debts of the partnership have first been provided for.

Having thus traced the doctrine of the partners' so-called lien to its modern conclusions, it is perhaps helpful at this stage to look back to the leading case of *West* v. *Skip* ((1749) 1 Ves. sen. 239; 27 E.R. 1006), from which it is largely derived, and to consider the way in which Lord Hardwicke worked out the rights of the partners amongst themselves, and the property to which those rights respectively attached. In the course of his judgment in the case mentioned, Hardwicke L.C. (*ibid.*, at p. 242) said :

> 'The partners themselves are clearly joint-tenants in the stock and all effects : not only that particular stock in being at the time of entering into the partnership; but to continue so throughout; whatever changes might be made in the course of trade. Otherwise it is impossible to carry it on. And being seised *per my and per tout*, when an account is to be taken, each is entitled to be allowed against the other everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought; and nothing is to be considered as his share but his proportion of the residue on balance of the account. That this is so at law appears from two cases, 2 Ld. Raymond 871 and *Heydon* v. *Heydon*, Sal. 392, where it was held, that judgment and execution against one partner for his separate debt, does not put the other in a worse condition; for he must have all allowances made him before the judgment-creditor can have the share of the other applied to him (2 Vern. 293; Cooke's *Bank. Law*, 298). So if one partner had died, the debts and effects survived : but yet the survivor is considered in this court barely as a trustee for the representatives of the deceased; upon which footing the account would be taken, and nothing considered as the share of the survivor till afterward; which is from the continuance of the property in the stock to the representative of the deceased partner, who has a specific lien thereon, although the survivor afterwards dies or becomes bankrupt. So if the partnership was dissolved by consent; as in this case, that determines not the legal interest, which continues as before; so that the property in the stock of the partner so going out is not devested thereby, but he remains equally intitled as joint-tenant with the other; and in a bill for an account the stock would be subjected for his satisfaction. Then as between one partner and the separate creditors of the other, the law and those two cases before mentioned say, that they cannot affect the stock any farther, than that partner could whose creditors they are'. (See, too, *Doddington* v. *Hallet* (1750) 1 Ves. sen. 497, 499; 27 E.R. 1165–1166.)

So far all that this establishes is that upon a dissolution of partnership, the outgoing partner has an indefeasible right to his share in the partnership assets, to be ascertained after the discharge of partnership debts (but not the personal debts of individual partners) and subject to the adjustment of accounts between the outgoing and the continuing partners : which is exactly what is more precisely laid down in section 39 of the Partnership Act, 1890. The question becomes more complicated, however, when there have been actual dealings with partnership property after the date of the dissolution.

Lord Hardwicke himself dealt with such a case in 1747, where the litigation, as it happens, arose out of earlier transactions in connection with the very partnership with which *West* v. *Skip*, *supra*, was concerned. It was the case of *Skipp* v. *Harwood*, 2 Swans. 586; 36 E.R. 739. One of the partners, Harwood, had a number of personal creditors, apart from creditors of his firm. He was also indebted to Skipp, his partner, on the partnership account. With the idea of protecting his goods against his other creditors, he arranged with his sisters, to whom he owed money, to enter up a collusive judgment against him, to levy execution on his goods (including his half-share in the partnership property), and then nevertheless to allow the goods to remain in his possession, so that he could trade with them. The partnership was dissolved as from the date of the execution, and Skipp, the continuing partner claimed that, as a partner, he had a right to have his debts on partnership account against Harwood satisfied out of Harwood's half-share in priority to the sisters, notwithstanding that that half-share had been taken in execution. His claim as a partner was upheld as regards sums due to him before the date of the execution. But as regards what was owing to him in a purely personal capacity, he could not look directly to Harwood's share in the partnership property for that. Nor could he claim directly upon Harwood's share for partnership liabilities that Harwood had incurred to him after the execution, since from that time onwards Harwood had been dispossessed (at any rate in theory) and his sisters had replaced him and had become tenants in common of the partnership property with Skipp. Lord Hardwicke, who found that the collusive execution was a fraud chose, however, neatly to turn the tables on Harwood without setting aside the execution. He treated the sisters as having constituted themselves partners with Skipp, acting as such through the agency of Harwood himself, and liable accordingly to account to Skipp for all partnership debts incurred by Harwood to Skipp after the date of the execution. For this purpose, as there was a continuing partnership, he was able to regard Skipp's interest as attaching like a mortgage to the partnership assets, however often they were turned over in the course of trading.

Another problem of a somewhat similar kind arose about a century later, in 1845, in *Stocken* v. *Dawson* (9 Beav. 239; 50 E.R. 335), and subsequently when the decision of Romilly M.R. was affirmed on appeal (17 L.J.Ch. 282). Two brothers, John and William, carried on business together in partnership. John died, making William his executor, with an option either to buy the business himself or to carry it on in trust for John's children. William, intending to exercise the option to buy the business for himself, kept it going, until a few years later he also died. The business was taken over and carried on by William's son, Oliver, who thought that his father had bought the business and had left it to him. Oliver, however, was unsuccessful. He incurred considerable debts, and eventually became bankrupt. Thereupon John's son claimed successfully to have the purported sale to William set aside, and to have his share and what was due on an account of the profits of it made good to him out of Oliver's estate. As against this, Oliver's unpaid trade creditors claimed a lien on the proceeds of sale of the former business property for the debts due to them; and John's children, for their part, claimed a lien for what belonged to John's estate. This, they pointed out, was not only John's own moiety, but also anything that William, at the date of John's death, had owed John on the partnership account. As it happens, there were no debts as between John and William at that date. Nor had William left any trading debts owing at his death. But it was held that what was due to John's estate in respect of John's half-share was in the nature of a partnership debt for which, by virtue of the so-called lien, William's moiety in Oliver's hands was answerable. On the other hand, the trading debts that Oliver had incurred were held to have been incurred by him in carrying on a business of his own without authority from any partner; and consequently the relative creditors were held to have no 'lien'. Presumably that meant that there was no one with a right or duty to insist on their being paid out in priority to a distribution amongst the partners of their shares. The creditors had only Oliver's bankrupt estate to which to look, instead of being able to recover satisfaction from a solvent partner who, in his turn, could exercise his 'lien' in their favour.

It was Lord Eldon, in deciding *Ex p. Ruffin* (6 Ves. 119; 31 E.R. 970), who laid it down in terms that creditors of a partnership have no direct lien on the assets. Four years later, in 1805, he himself explained that decision in delivering judgment in *Ex p. Williams* (11 Ves. 3; 32 E.R. 988), as follows :—

> 'The grounds upon which I went in *Ex p. Ruffin* were these. Among partners clear equities subsist, amounting to something like lien. The property is joint; the debts and credits are jointly due. They have equities to discharge each of them from liability and then divide the surplus according to their proportions : or if there is a deficiency, to call upon each

other to make up that deficiency, according to their proportions. But while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners; and get judgment; and may execute his judgment against the effects of the partnership. But when he has got them into his hands, he has them by force of the execution, as the fruit of the judgment: clearly not in respect of any interest he had in the partnership effects, while he was a mere creditor, not seeking to substantiate, or create, an interest by suit. There are various ways of dissolving a partnership. . . . In no one of these cases can it be said that to all intents and purposes the partnership is dissolved; for the connection still remains, until the affairs are wound up. The representatives of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor, or the solvent partner: but still in either of these cases that community of interest remains, that is necessary until the affairs are wound up: and that requires, that what was partnership property before shall continue, for the purpose of a distribution, not as the rights of the creditors but as the rights of the partners themselves require: and it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity; as in the case of death it is the equity of the deceased partner, that enables the creditors to bring forward the distribution (1 Ves. jun. 434, 435; 9 Ves. 596, 597, and the note). The creditors are not injured by the agreement of the partners to dissolve the partnership, and that from that time what was joint property shall become the separate property of one; notice of the dissolution being given; as either a consideration is paid: or, which for this purpose is equal to consideration, a covenant is entered into to pay the debts, and indemnify the retiring partner, so conceived as not to leave any lien upon the property. . . . But it is enough to say, mere dissolution of partnership, if there is no more, leaves each partner in possession, as trustee for all, to the extent of enabling each to call upon all to apply the partnership effects to the purposes, to which they ought to be applied, even if there was no dissolution. But it is the equity of the partners among each other, that requires that application; not that of the creditors; for whom, however, a condition is thereby necessarily operated, which they could not operate for themselves, unless by action and execution; laying hold of the effects; as they might of the person'.

Such being the limited and indirect rights and remedies of creditors of the partnership, it is still important to distinguish between these and the more remote rights of creditors of the individual partners, whether secured upon partnership property or not.

As long ago as 1733, it was held in *Croft* v. *Pike* (3 P.Wms. 180; 24 E.R. 1020) that a creditor on a bond of a deceased partner is not entitled to be satisfied out of the assets of the partnership until all

the partnership debts have been paid and the share of the deceased in the surplus has been ascertained.

This was followed and enlarged upon by Lord Hardwicke in 1749–50 in *Ryall* v. *Rowles* (1 Ves. sen. 348; 27 E.R. 1074). In another of his monumental judgments, that great Lord Chancellor (*ibid.*, at p. 374) expounded the law thus :

> ' And the case cited of *Croft* v. *Pike* is as strong as any negative authority can be; for there it was not attempted to give the surviving partner a right of retainer or bringing into the partnership account of a bond debt, so as to be preferred to others, but only as executor; and therefore the money taken by a deceased partner out of the partnership stock, was allowed to be brought into the partnership account, but the bond debt was not, because a separate loan and transaction. If then by a new determination now it should be admitted, and that one partner by lending money to another in a separate capacity, not relative to the partnership, should gain a specific lien on the effects of the partner so borrowing, it would open a door to fraud, and so defeat this statute; for then a person might be taken in as a partner into a moiety of a great stock and flourishing trade, and he may have a separate credit on that confidence, and yet may not have any in reality of the property in that stock, but the whole may belong to others; which tends plainly to great fraud and imposition on traders, and great mischief '.

Even a mortgagee of partnership property, who has advanced money to one of the partners for his private purposes on the security of such a mortgage, has his rights as mortgagee postponed to the right of the other partner to be reimbursed out of partnership assets the amount paid by him in discharge of partnership debts, if in fact the mortgagee had, at the time the mortgage was effected, even constructive notice that the mortgaged property belonged to the partnership. This was established in 1873, in *Cavander* v. *Bulteel*, L.R. 9 Ch. 79, where one of two partners borrowed money on the security of the partnership premises. He used the money for his own purposes and then absconded, leaving his partner to pay all the partnership debts. The mortgagee sought to enforce his security, but the court held that as he knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, and that his claim must be postponed to that of the partner who had paid the debts. It did not even make any difference that the debts had all been paid after the date of the mortgage. The rights of the partner (the so-called lien) took precedence over any rights arising out of the other partner's private transactions affecting partnership property.

In an earlier case, decided in 1853, it was held that the mortgagee of a part-owner's seven-eighths share in a ship could not enforce his security upon the proceeds of sale of the cargo, at any rate until the expenses of the outfit of the ship and the voyage had

been paid. (*Alexander* v. *Simms*, 18 Beav. 80; 52 E.R. 32; on appeal, 5 De G.M. & G. 57; 43 E.R. 791.)

Already in 1848, in the case previously cited above of *Green* v. *Briggs* (6 Hare 395; 67 E.R. 1219), in which, incidentally, the future Lord Romilly was engaged as counsel, Wigram V.-C. had decided that part-owners of a ship were in the position of partners, and that any such part-owner has the right to require the gross freight to be applied, in the first place, in payment of the expense of the outfit of the ship for the voyage in which the freight was earned. In so holding, the Vice-Chancellor was applying a decision of twenty years earlier in *Holderness* v. *Shackels* (B. & C. 612; 108 E.R. 1170). It was there held, where there was a joint adventure in whale fishery, and the practice was to allocate the oil to several part-owners in casks stored in a warehouse and marked with their respective initials, that as the agreement was that the oil was not to be released if the warehouseman had notice that disbursements in connection with the ship had not been paid, oil so allocated to a part-owner who became bankrupt before having paid up his share of the disbursements was still subject to the 'lien' of the co-owners for such disbursements, so far as such oil had not already been removed from the warehouse.

The right of partners (by analogy with the shareholders in a limited company) to prevent a distribution of profits while the debts of the partnership were unprovided for was referred to by Turner V.-C. in *Stevens* v. *South Devon Ry.* (1851) 9 Hare 313, 326; 68 E.R. 524, 530. In *Ex p. Morley* (L.R. 8 Ch. 1026) it was held that the estate of a deceased partner could only take his partnership assets subject to payment of the debts of the partnership, notwithstanding that the whole of the capital belonged to and was provided by the deceased. Similarly, in 1856, the Court of Chancery, both at first instance and on appeal, decided that where the owner of a ship had assigned a share in the ship, there was a 'lien' on the freight earned for expenses, as though the owner and the assignee were partners, before the actual sum due to each could be paid out. (*Lindsay* v. *Gibbs*, 22 Beav. 522; 52 E.R. 1209; on appeal, 3 De G. & J. 690; 44 E.R. 1435.)

The point which these cases establish emerged in *Re Ritson* [1899] 1 Ch. 128. It is that what each partner is really entitled to enjoy is the surplus of the assets over the liabilities and the net profits of the undertaking after payment of the outgoings. As it was expressed obiter, and by way of contrast, in the old case (in 1728) of *Meliorucchi* v. *Royal Exchange Assurance Co.* (1 Eq.Cas. Abr. 8, 9; 21 E.R. 833, 834):

> 'And the Court held that this was not like the Case of Partnership, where if any of the Partners borrowed any of the Partnership's Money, his own share should be answerable for it, and he should not be permitted to come into a Court of Equity, and pray an Account of his share of the Partnership,

> Stock, and Effects, without making Satisfaction for the Debt he owed to the Partnership '.

That is to say, until the debts are paid, the respective shares of the partners are not ascertainable or, at any rate, distributable. In *Re Ritson*, *supra*, one of the partners died, having mortgaged his real estate to secure a partnership debt. The joint assets of the partnership were more than sufficient to discharge the partnership debts; and the surplus was divided, the deceased partner's share forming part of his personal estate. This did not satisfy the persons entitled to take the personalty under his will, who complained that in discharging the partnership liabilities no recourse had been had to the real estate, despite the existence of the mortgage. The court held this complaint to be without foundation. The personal estate, it was pointed out, was not being made to bear the whole or any burden of the partnership liabilities, since the only personalty that belongs to the estate at all is the surplus after payment out of the share of the deceased of the partnership liabilities.

It looks at first sight as though this case reinforced by the dictum of Fletcher Moulton L.J. in *Re Bourne* [1906] 2 Ch. 427, 434, cited above, in another connection,

> (' As soon as you get your surplus, the lien attaches. Until you get your surplus there is no claim or lien which in any way affects the power and duty of the surviving partner to realise the property of the partnership, and to discharge its liabilities '.)

were in conflict with the earlier decisions in *Holderness* v. *Shackels*, *supra*, and *Lindsay* v. *Gibbs*, *supra*, in which partners were expressed to have a ' lien ' on the partnership assets for expenses paid. The reconciling factor is, however, to be found in the warnings given by both Wigram V.-C. in *Green* v. *Briggs*, *supra*, and Fletcher Moulton L.J. himself in *Re Bourne*, *supra*, in the extracts from their respective judgments previously cited, as to the misapplication of the word ' lien '. In neither class of case is it properly apposite; but in the earlier cases it is used to denote the right of surviving solvent or continuing partners to withhold distribution of the assets until the debts have been paid, whereas in the later cases it is applied to the further right of such partners to insist upon an adjustment of account between themselves and the outgoing partner or his estate before the share of the latter is paid over. But underlying both uses of the term is the fundamental conception, now enshrined in the Partnership Act, 1890, s. 39, that once partnership has been dissolved, there must be a two-fold screening of the available assets before any partner can lay an exclusive claim to any particular part of them.

If, therefore, every surviving partner has, to repeat once more the words of Fletcher Moulton L.J. (*loc. cit.*), ' the power and duty . . . to realise the property of the partnership, and to discharge its liabilities ', this would seem to create something in the nature of

an equitable interest on the part of creditors in the assets of a dissolved partnership. As has already been seen (*Ex p. Ruffin*, *supra*, and *Ex p. Williams*, *supra*) Lord Eldon made it very clear at an early date that this amounted to no such thing as a direct lien. The importance of considering its limitations lies in the risk of the assets being alienated without the right to follow them.

Bearing in mind that whatever equitable right the creditor may have is enforceable only by a partner as his trustee, the following authorities throw some light on the subject.

In *Skipp* v. *Harwood* ((1747) 2 Swanst. 586, 588; 36 E.R. 739, 740), already discussed above, Lord Hardwicke is reported as having said :

> ' It is no objection that the goods taken in execution have been since frequently changed, for the specific lien which the other partner had on those goods devolves on those which have been taken in the place thereof, and always continues. And so it is in the case of a mortgage of stock, and goods in trade, for in such case if the lien was to fall on the goods in trade when the mortgage was made, and not on those taken afterwards the trade must stop '.

A mere turning over of the stock, therefore, does not defeat the rights of the creditors to have recourse made to the assets of the partnership. Equally, as was said in *Re Langmead's Trusts* ((1855) 20 Beav. 20; 52 E.R. 509; and cf. on appeal, 7 De G.M. & G. 353; 44 E.R. 138), where a surviving partner has taken an assignment for value of the interest of his deceased partner, with whose executors he has covenanted to pay all the partnership debts, the executors could follow the partnership property into the hands of the surviving partner for the purpose of having it applied in payment of the debts. But that point is the limit of their reach. A purchaser, it was held in the same case, even one with notice of the covenant, is not liable to have the assets followed into his hands. The principle is that the surviving partner is no more than a trustee of the assets or the proceeds representing them, with full power to dispose of them for corresponding value. Consequently, a purchaser from him, whether with or without notice of the trust, is under no duty to see to the application of the purchase-money. It hardly needs saying that this doctrine only protects bona fide transactions. It would be different if the alienation were fraudulent or otherwise improper. Farwell J., in giving judgment in *Re Bourne* [1906] 1 Ch. 113, 119, said :

> ' Of course, if a man knows as a fact that the surviving partner is going to pay a gambling debt or something of that sort, I do not say for a moment that he would be assisted by *Re Langmead's Trusts*, which puts it, to my mind, on a very intelligible ground, namely, that a surviving partner is in the position of a trustee who has power to sell and power to give receipts, except so far as he is fixed with express knowledge

that an improper application of the purchase money is intended '.

So far, then, it appears that, upon a dissolution of partnership, the share of each partner in the assets of the firm is limited to the surplus after payment of the partnership debts, and is subject to adjustment as between the partners themselves; that each partner's interest in the assets, while ranking after that of creditors of the firm, ranks ahead of any creditor of any of the other partners personally, even a creditor holding security on partnership property; and that for all these purposes, the assets of the partnership are such assets as existed at the time of the dissolution or the proceeds of their sale or other assets acquired with such proceeds, but not such of the former assets themselves as may have been sold to a bona fide purchaser.

There are, however, a few apparent exceptions to these rules which should be noted, although in truth they are merely cases outside the scope of the rules themselves.

The earliest notable example of the kind is the case of *Smith* v. *De Silva*, 2 Cowp. 469; 98 E.R. 1191. This action came before the Court of King's Bench, presided over by Lord Mansfield, in 1776. One of three partners became bankrupt, having failed to pay up his share of the partnership capital in full. Another partner voluntarily made good the deficiency, and thereupon claimed to stand in his shoes in the division of the profits. It was held, however, that the bankrupt's estate was entitled to a full third share of the profits, and that the other partners had no more than a right of proof in the bankruptcy for the unpaid balance of capital as a debt due at the commencement of the bankruptcy. The mere fact that the bankrupt owed a capital contribution at the date of the dissolution of partnership gave the other partners no lien on his share of the profits. This is merely a normal application of the bankruptcy law. The bankruptcy and the dissolution of partnership coincided as cause and automatic effect. But by the operation of the bankruptcy, the partner's indebtedness on capital account was converted into a mere provable debt. His one-third interest in the partnership remained nevertheless an asset of his estate. There was consequently no obligation to make good his capital indebtedness out of the profits (as opposed to a possible set-off on the capital account) to which the partners' so-called lien could attach.

In 1827, the case of *Nerot* v. *Burnand* (4 Russ. 247; 38 E.R. 798) came before Lord Lyndhurst (having previously been argued before Lord Eldon, who resigned his office before having delivered judgment). A sister conducted the business of an hotel with the financial assistance of her brother, who was mostly abroad in France. The sister then married, and the brother, objecting to the marriage, professed to dissolve the partnership which he claimed existed between himself and his sister. The sister and her husband

denied that there ever was a partnership between them, and protracted litigation followed, during the pendency of which, the sister continued to carry on the business, and in the course of years, changed many of the assets. The Vice-Chancellor, finding that there was a partnership which was duly dissolved on the marriage of the sister, declared that the brother was entitled to a share of the assets as they stood at the date of his decree, which was some six years after the date of dissolution. On appeal, the Lord Chancellor held that the assets of the partnership must be valued as at the date of dissolution, and that subsequent unauthorised trading with them was no concern of the outgoing partner's.

Again this is no exception to the rules affecting the partners' rights against the assets. It only goes to the date at which the assets should be ascertained, and might, if the continuing partner had traded improvidently have operated favourably to the outgoing partner. The law on the point most likely to arise in such cases has meanwhile been settled by statute. By section 42 of the Partnership Act, 1890, an outgoing partner in such an event has a choice between recovering such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at 5 per cent. per annum on the amount of his share of the partnership assets. It is true, however, that the court must still apply the principle in *Nerot* v. *Burnand*, *supra*, in determining what actually is the outgoing partner's share of the partnership assets.

Another apparent exception arises where specific items have been expressly allocated to a particular partner. It has already been noticed how in *Holderness* v. *Shackels* (8 B. & C. 612) the allocation to particular partners of oil in earmarked barrels was not enough, in face of notice to the warehouseman that disbursements had not been paid, to prevent the goods from being made available for the discharge of these obligations; though such allocated goods, when already removed, could not apparently be followed. But the so-called lien was excluded altogether in favour of the outgoing partner in a case decided in 1824, some four years earlier than *Holderness* v. *Shackels*, *supra*. This was *Lingen* v. *Simpson* (1 Sim. & St. 600; 57 E.R. 236), where, by the terms of the dissolution, a specific article, formerly belonging to the partnership, had been expressly allocated to the outgoing partner. In that case the assets were actually insufficient to satisfy the partnership debts. Nevertheless, no exception is afforded to the rules. The *ratio decidendi* was simply that the article in question had pursuant to an agreement ceased, on and by virtue of the dissolution, to be partnership property.

An interesting case in 1837 again raised the question as to how far and in what circumstances the right of a partner to look to partnership property for the return of his investment in the enterprise could be defeated. In *Ewing* v. *Osbaldiston* (2 My. & Cr. 53; 40 E.R. 561) a partnership had been formed for exploiting the

Surrey Theatre in South London. After a considerable sum of money had been sunk in the venture, a curious enactment was brought to the attention of the parties by which at that date it was actually illegal to give performances at that theatre (amongst many other places). The plaintiff in the action claimed a lien on the property bought with the capital contributed by him for the return of his money. He was quite innocent of any idea that the project would amount to a breach of the law. All the same the court refused him any relief. (See 2 My. & Cr. 88; 40 E.R. 573.) But again this was no exception. The taint of illegality placed the whole contract of partnership outside the law.

The case of *Holroyd* v. *Griffiths* (3 Drew. 428; 61 E.R. 966) came before Kindersley V.-C. in 1856. There the plaintiff had sold a half of his own half-share in an indigo deal to one Thomas, who defaulted in payment of his agreed contribution. The plaintiff had instructed the defendants to sell the indigo and credit the proceeds separately to himself and Thomas respectively. This they did, and Thomas thereafter charged his share in favour of certain creditors of his own. The plaintiff alleged that he had had to pay Thomas's contribution for him, and claimed a lien on Thomas's share of the proceeds of sale. The Vice-Chancellor dismissed his bill. On the face of it this is an exception to the rule that an obligation to a partner takes precedence, where partnership property is concerned, to a private obligation. But it is not so. The ground of the decision was that the plaintiff, having himself expressly instructed the defendants to place Thomas's share to a separate account, had, in effect, renounced any interest in or rights against the fund, and had enabled Thomas to create other interests in it in favour of innocent third parties. In effect there was an estoppel.

Finally, the limits of the precedence taken by disbursements over the rights of mortgagees of a ship were considered in 1859 in *Bristow* v. *Whitmore* (4 De G. & J. 324; 45 E.R. 126), in which the master of a ship, who had himself paid out sums for necessary expenses, claimed a lien on the freight as against the mortgagees of the ship. He was unsuccessful; and the reason was that as the master, he was merely a servant of the owner, and had no proprietary interest whatsoever in the finance of the enterprise. His remedy was no more than a personal one against the owner. Those circumstances are accordingly, as in some of the other apparent exceptions mentioned, outside the scope of a partnership. (See also *Smith* v. *Plummer* (1818) 1 B. & Ald. 575, 582; 106 E.R. 212, 214.)

Once the cases have been carefully examined and understood, the only real difficulty in sorting out the interests of partners respectively in the assets of the firm on a dissolution is caused by the introduction of the word 'lien'. It may be that in the course of time the expression will be fully received into legal terminology in a third category as a 'partner's lien', with a well defined meaning, as distinct either from a 'common law lien' or an

'equitable lien' as the latter is from the former. It may indeed insinuate itself by the same entrance as the 'equitable lien' also used to acquire acceptance as such, notwithstanding that it deserved no recognition as a lien, except by courtesy. But perhaps, before it is too late, judicial ingenuity will devise a compendious term that will be understood accurately as denoting no more and no less than that right which, on a dissolution of partnership every partner enjoys pursuant to the provisions of section 39 of the Partnership Act, 1890.

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RACIAL AND RELIGIOUS DISCRIMINATION BY INNKEEPERS IN U.S.A.

Under the common law of England, an innkeeper is bound to receive and lodge in his inn all travellers, and to entertain them at reasonable prices without any special or previous contract, unless he has some reasonable ground for refusal.[1] This rule is not based upon any statutory provision but on custom, and has been given expression in a number of decisions of the English courts.[2] The same rule requires an innkeeper not to oust his guest, once admitted, without reasonable ground.

An innkeeper who violates this duty commits a crime and can be punished.[3] He is also liable in damages to the traveller aggrieved.[4]

The rule, which is an exception [5] to the general rule that everybody is at liberty to choose his customers, owes its existence to conditions in former times when advance bookings were not customary or possible. Travellers arriving in a place to spend the night would have been put to a great inconvenience if the innkeeper, who ran the only inn in the place, had been at liberty to refuse to admit the traveller without reasonable ground.

This common law rule also prevails in countries which have received the body of English common law, as the English-speaking parts of Canada and the United States.[6]

Thus it was held in a case arising in the Canadian province of Ontario in 1887 that a traveller, who has come to an inn as a guest,

[1] Halsbury's *Laws of England*, 2nd ed., vol. 18, p. 141; *Robins* v. *Grey* [1895] 2 Q.B. 501 at p. 503.

[2] See cases cited in notes 3 and 4.

[3] Halsbury, *l.c.*, p. 148; *R.* v. *Luellin* (1701) 12 Mod.Reports 445; *R.* v. *Ivens* (1835) 7 C. & P. 213; *R.* v. *Rymer* (1877) 2 Q.B.D. 136.

[4] Halsbury, *l.c.*, p. 147; *Fell* v. *Knight* (1841), 8 M. & W. 269; *Constantine* v. *Imperial Hotels, Ltd.* [1944] 1 K.B. 693. This case arose when the proprietors of the Imperial Hotel in London refused to accommodate the well-known West Indian cricketer, Constantine. In awarding nominal damages for violation of the innkeeper's common law duty, Birkett J. held that it was no answer to the claim that the plaintiff had been offered alternative accommodation in another hotel of the defendant company, and further held that no special damages had to be proved in such an action.

[5] Another exception is the duty of the common carrier to receive and convey all persons applying for passage.

[6] The Roman law had no rule similar to the common law rule imposing a duty on an innkeeper to receive guests. In this respect the situation of an innkeeper did not differ from that of other businessmen who were at liberty to conclude a contract with another person or to refrain from entering into a contractual relation. This liberty of the innkeeper to choose his clients is given in the *Corpus Juris Civilis* as a reason for his strict liability with regard to the luggage brought in by the traveller. (Nam est in ipsorum arbitrio ne quem recipiant, Dig. lib. 4, tit. 9, 1.1., par. 1.) See *Story on Bailments*, 9th ed. (1878), p. 437.

and has stayed there six weeks and paid for his board by the week, has, if ousted abruptly without cause, a right of action for damages against his landlord on the common law relation of innkeeper and guest. (*Whiting* v. *Mills* 7 U.C.R. 450.)

The rule as prevailing in the United States has been formulated by Story in his standard work on bailments as follows : ' An innkeeper is bound . . . to take in all travellers and way-faring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence '.[7] A number of decisions of American courts have recognised and applied this rule.[8] In a few States as in Maine, Montana and Utah there have been passed laws codifying this common law rule.[9]

The rule, however, did not always serve to prevent an innkeeper from refusing to receive a guest on racial grounds. Two ways for innkeepers to exercise racial discrimination in the admission of their guests were kept open by the courts. One method was to hold as follows : The rule does not prohibit an innkeeper to refuse admission if he has reasonable ground for such refusal. If the person seeking admission as a guest is so objectionable to the patrons of the innkeeper on account of his race that the business of the landlord would be injured by his admission, the innkeeper has a reasonable ground for refusing admission to this person.[10]

The other method embodied in a dictum of an English court was to rule that the common law rule need not be understood as preventing an innkeeper from reserving his inn to special classes of guests, and that if he did so reserve his inn the common law rule applied to persons falling within such special class only, but not to persons outside this class.[11]

These gaps in the common law rule could be filled only by statutory provisions. The attempt to prohibit by federal statute discrimination by innkeepers on account of race failed when the Supreme Court of the United States in 1883 declared unconstitutional the Federal Civil Rights Act of 1875, which contained such a prohibition.[12] One of the grounds of the decision was that the XIVth Amendment to the United States Constitution, which made it unlawful for any State to deny due process and equal protection, did not authorise the Federal Government to enact legislation barring discrimination by private individuals. It is interesting to note

[7] *Story on Bailments*, 9th ed. (1878), p. 444.
[8] See, *e.g.*, *Markham* v. *Brown* (1840) 8 N.H. 523; *Bowlin* v. *Lyon* (1885) 67 Iowa 536; *De Wolf* v. *Ford* (1908) 193 N.Y. 397.
[9] Revised Statutes of Maine, 1945, Chap. 88, Sect. 29; Revised Codes of Montana, 1935, Penal Code, Chap. 35, Sect. 11–218; Utah Code Annotated, 1943, Sect. 103–29–2.
[10] See *State* v. *Steele* (1890) 106 N.C. 766 at p. 782.
[11] See Story, *l.c.*, p. 437, note 8, including citation of Parke B. in the English case *Johnson* v. *Midland Ry.*, 4 Exch. 367 at p. 371.
[12] *Civil Rights Cases* (1883) 109 U.S. 3.

that Mr. Justice Harlan, in his dissenting opinion, stressed the public nature of the innkeeper's business which he derived from his common law duty to admit travellers, and in this connection he went as far as to state that innkeepers are agents and instrumentalities of the State, and therefore subject to federal regulation based on the XIVth Amendment.

After the failure of the attempt to enact a nation-wide federal statute against discrimination by innkeepers (and, incidentally, by some other businesses of a public nature), a number of States enacted State laws against racial discrimination by innkeepers, following the example of Massachusetts which had passed such a law as early as in 1865 (Laws of 1865, Chapter 277). At present such laws are in force in some eighteen States.[13] They declare the right of an individual to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of places of public accommodation, resort and amusement, and they impose civil or criminal sanctions or both upon a violation of this right. Some of the laws are very elaborate while others are short. As an example of the latter kind, the law of the State of Washington may be cited, which reads as follows :—

> 'Every person who shall deny to any other person because of race, creed, or color, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement, shall be guilty of a misdemeanor'.[14]

A comparison of the common law rule and the rule contained in the civil rights statutes shows that the duty spelled out by the latter is broader in a number of respects:

(a) While the common law rule imposes duties on innkeepers, the civil rights laws refer to places of public accommodation, resort and amusement and thus apply to a much wider range of establishments.

(b) The common law rule protects travellers only; the civil rights laws spell out the right of all persons—or, in some States, of all citizens—to be free from discrimination in places of public accommodation, resort and amusement.

(c) As mentioned above, the common law rule qualifies the right of the traveller to admission by innkeepers by the proviso that the innkeeper may refuse admission on reasonable grounds. Whether a refusal to admit a guest based on the race or religion of the traveller is reasonable or not will have to be decided in each actual case; the rule itself does not give any guidance for a decision either way. Under the civil rights statutes, on the other hand, such a discrimination is absolutely prohibited. There are, incidentally,

[13] See analysis of statutes barring discrimination by places of public accommodation in *How Secure These Rights?*, an Anti-Defamation League Survey by Ruth Weintraub, Doubleday & Co., Inc., 1949, pp. 124 to 145.

[14] Remington Revised Statutes of Washington, 1932, Tit. 14, Chap. 10, Sect. 2686.

two methods to be found in the civil rights statutes for expressing this absolute prohibition. In some States it is expressly stated in the law that discrimination based on race, religion, national origin or ancestry is prohibited. The same result is reached in the other States by the provision that nobody shall be barred from the full and equal enjoyment of the facilities of places of public accommodation except upon conditions and limitations lawfully established and applicable alike to all persons; this formulation is wide enough to exclude any conditions or limitations based on race, religion, national origin or ancestry of a person seeking accommodations.

Some of the States have enacted a prohibition of a different type in connection with discrimination by places of public accommodation. They prohibit the publication of communications, notices or advertisements to the effect that any of the accommodations, advantages, facilities and privileges of a place of public accommodation be refused to a person on account of his race or religion or that the patronage of any person belonging to a particular race or religion is unwelcome or objectionable. If such a prohibition is found in a State which also bans racial and religious discrimination the prohibition of discriminatory advertising serves the purpose of implementing the ban on discrimination itself. This is the situation in seven of the nine States which have enacted legislation against discriminatory advertising. The two remaining States—New Hampshire and Maine—have no civil rights law against racial or religious discrimination in places of public accommodation [15]; the laws prohibiting discriminatory advertising in these two States cannot, therefore, be said to implement a ban on racial or religious discrimination; rather they have the character of measures directed against group defamation by publication of matter implying that certain racial or religious groups are second rate.

The fight for civil rights legislation which, of course, is not confined to questions concerning places of public accommodation, but covers a wide field of subjects (discrimination in employment, education, housing, etc.) has received a big impetus by the Report of the President's Committee on Civil Rights appointed by the President of the United States to study the problems of civil rights.[16] With regard to the laws against discrimination in places of public accommodation, the Report states that the civil suit for damages and the misdemeanor penalty have proved to be inadequate sanctions to secure the observance of these laws, and adds that additional means, such as the revocation of licences, and the issuance of cease-and-desist orders by administrative agencies are

[15] Maine has, however, enacted the common law rule regarding admission to inns: see above, note 9.

[16] *To Secure These Rights*, Simon & Schuster, New York, 1947.

needed to bring about wider compliance.[17] Thus, the legal development which has started with the common law rule on innkeepers is not yet concluded. Of course, no one believes that the elimination of discrimination by places of public accommodation can be achieved by legislation alone. It is by enlightenment of the broad public through the vehicles of education that racial and religious discrimination in this as in many other fields will finally be removed.

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[17] *L.c.*, p. 171. The latter recommendation was implemented by the States of Connecticut and New Jersey which recently passed laws authorising administrative agencies to eliminate discrimination in places of public accommodation by enforceable cease-and-desist orders.

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JURISDICTION IN BANKRUPTCY

A STUDY IN THE INTERRELATION BETWEEN CHOICE OF LAW CLAUSES AND THE CONFLICT OF LAWS

I. LEGISLATION 1825–1914

In recent years choice of law clauses in domestic legislation have attracted considerable attention.[1] Some have been examined in considerable detail, but others have scarcely been noticed. Among the latter, the provisions contained in the Bankruptcy Act, 1914, are of particular interest not only from the theoretical but also from the historical point of view. Moreover, the Court of Appeal has recently had the rare opportunity of discussing and applying them.[2]

The Bankruptcy Act, 1914, provides :—

1.—(1) A debtor commits an act of bankruptcy in each of the following cases :—

(*a*) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally;

(*b*) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof;

(*c*) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt;

(*d*) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house;

(*e*) If execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days :

Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the proceedings on such summons are finally disposed of, settled, or abandoned, shall not be taken into account in calculating such period of twenty-one days;

[1] Morris, (1946) 62 L.Q.R. 170; Robertson, *Characterisation in the Conflict of Laws* (1940), p. 99; Nussbaum, *Principles of Private International Law* (1942), p. 70.

[2] *Re a Debtor* (*No.* 335 *of* 1947) [1948] 2 All E.R. 533; 64 T.L.R. 446.

(*f*) If he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself;

(*g*) If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained:

For the purposes of this paragraph and of section two of this Act, any person who is, for the time being, entitled to enforce a final judgment or final order, shall be deemed to be a creditor who has obtained a final judgment or final order;

(*h*) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

1.—(2) In this Act, the expression 'a debtor', unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him—

(*a*) was personally present in England; or

(*b*) ordinarily resided or had a place of residence in England; or

(*c*) was carrying on business in England, personally, or by means of an agent or manager; or

(*d*) was a member of a firm or partnership which carried on business in England.

4.—(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless

(*d*) the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in England, or (except in the case of a person domiciled in Scotland or Ireland or a firm or partnership having its principal place of business in Scotland or Ireland) has carried on business in England, personally or by means of an agent or manager, or (except as aforesaid) is or within the said period has been a member of a firm or partnership of persons which has carried on business in England by means of a partner or partners, or an agent or manager,

nor, where a deed of arrangement has been executed, shall a creditor be entitled to present a bankruptcy petition, founded

on the execution of the deed, or on any other act committed by the debtor in the course or for the purpose of the proceedings preliminary to the execution of the deed, in cases where he is prohibited from so doing by the law for the time being in force relating to deeds of arrangement.

Choice of law clauses incorporated in domestic statutes purport to establish the limits of operation of these statutes. The origin of these clauses can be traced back to the Dutch doctrine of the seventeenth century which held that conflicts of laws could be solved by restricting the competence of every country to legislate for its own subjects, local residents and goods situate within its territory.[3] This doctrine failed, for it did not determine in what circumstances one country must apply the laws of another where the facts are connected with several countries. It could claim a limited success in respect of all actions where it was not envisaged that foreign law should ever be applied by the *forum* and where the question was solely whether the forum had jurisdiction. Such questions arise, for instance, in administrative law, criminal law and the law of bankruptcy. Choice of law clauses determine either the circle of persons, the class of objects or the type of transaction to which the statute is to apply.

The Bankruptcy Consolidation Act, 1825,[4] defined, in the first place, the circle of persons subject to the Act. They were only traders exercising one of the trades enumerated in section 2. The Act did not state that the trade must be carried out in England, but the insistence on trading appears to have excluded foreign traders who did not carry on trade in England. This question was clarified by subsequent legislation. In the second place the Act provided a list of transactions which were to be treated as acts of bankruptcy.[5] This list foreshadowed that now contained in section 1 (1) of the Bankruptcy Act, 1914. However, the only reference to acts done abroad occurred in section 3 of the Act of 1825, which like section 1 (1) (*b*) of the Act of 1914 mentioned fraudulent conveyances in England or elsewhere.

The Act of 1825, therefore, defined the circle of persons to which it was to apply by referring to their personal qualifications. By implication the Act restricted itself to those trading in England, until the Act of 1849, section 90, expressly confirmed this view. As regards the nature of the transaction, sections 3–6 contained no territorial restrictions. The provision in section 3 meant naturally in this connection conveyances made abroad by a person trading in England, and thus having effect, if only indirectly, in England, either by reducing the assets in England, or, if operative abroad, by curtailing the rights of the English creditors to assets abroad.

[3] Cp. Huber, *Praelectiones Juris Romani et Hodierni*, vol. 2, bk. 1, tit. iii, par. 2. See also Story, *Conflict of Laws* (8th ed. 1883), pp. 21–25 (paras. 18, 20, 23).
[4] 6 Geo. 4, c. 16.
[5] Sections 3–8.

It is understandable that section 4 of the Act of 1825, which dealt with the conveyance of all property to trustees for the benefit of creditors, did not refer to conveyances made abroad,[6] for it was well established that universal assignments by persons domiciled in England extend to property abroad [7] and that universal assignments of movables made by persons domiciled abroad are effective in England, if made in accordance with the law of the assignor's domicile.[8] Thus, whether the assignor was domiciled in England or abroad, any universal assignment in accordance with the law of his domicile was recognised according to the English rules of private international law. The Bankruptcy Act only determined the question of jurisdiction by requiring that the assignor must be trading in England.

The Insolvent Debtors Act, 1842,[9] must be mentioned next. This Act applied chiefly to non-traders, and allowed only petitions by debtors themselves. A debtor had to publish notices in the *London Gazette* and in some newspapers circulating in the county wherein he resided.[10] It is thus clear that the debtor, in order to enjoy the benefit of the Insolvent Debtors Act, 1842, had to be resident in England. These two statutes form the basis of the present law relating to jurisdiction in bankruptcy. The Bankruptcy Consolidation Act, 1849, s. 65,[11] virtually reproduced the list of persons who were made subject to the bankruptcy law in virtue of section 2 of the Act of 1825. Similarly, the catalogue of acts of bankruptcy underwent little change, except that detailed provisions were added regulating acts of bankruptcy by non-payment after summons. Debtor's petitions were introduced,[12] and creditor's petitions were normally to be prosecuted in the court for the district in which the trader had resided or carried on business for six months next before the petition.[13]

The Bankruptcy Act, 1861,[14] attempted to place traders and non-traders on a more equal footing by amalgamating the Bankruptcy Act and the Insolvent Debtors Act. No new catalogue of

[6] But see the Bankruptcy Act, 1914, ss. 1 (1) (*a*), 167.

[7] *Sill* v. *Worswick* (1791) 1 H.Bl. 665; *Hunter* v. *Potts* (1791) 4 T.R. 182; *Phillips* v. *Hunter* (1795) 2 H.Bl. 402; Dicey, Rule 54, p. 328, n. 15, pp. 329, 330, n. 26, p. 331, n. 27.

[8] *Solomons* v. *Ross* (1764) 1 H.Bl. 131 (n.); *Jollet* v. *Deponthieu* (1769) 1 H.Bl. 132 (n.); Dicey, Rule 99 and p. 440, n. 17; Nadelmann (1946) 9 M.L.R. 154. It should be noted that today the rule is no longer accepted in this restricted form. A foreign assignment in the course of proceedings in bankruptcy in a court to whose jurisdiction the debtor is subject, although he is not domiciled there, is a valid assignment of the movables of the bankrupt in England. See *Re Davidson's Settlement Trusts* (1873) L.R. 15 Eq. 383; *Re Lawson's Trusts* [1896] 1 Ch. 175; *Re Anderson* [1911] 1 K.B. 896; compare Dicey, Rule 99, p. 440, n. 20, and the cases cited there.

[9] 5 & 6 Vict. c. 116.

[10] Section 1.

[11] 12 & 13 Vict. c. 106.

[12] *Ibid.*, s. 93.

[13] *Ibid.*, s. 90.

[14] 24 & 25 Vict. c. 134.

acts of bankruptcy was enacted. The old catalogue remained in principle applicable to traders, but a number of acts were set out, some of which were to be acts of bankruptcy if committed by a trader only,[15] others if committed by traders and non-traders,[16] and some if committed by non-traders only.[17] It must be noted that section 70, in so far as it extended the provisions relating to fraudulent conveyances[18] to non-traders, omitted to include conveyances 'elsewhere'. This omission may have been influenced by the insertion in the definition section[19] of a provision that '"property" shall mean all the real and personal estate within the Realm and abroad', but this provision, and its successors, envisaged the universality of the effect of an English bankruptcy and did not necessarily refer to the acts which may cause a bankruptcy.[20]

By omitting to require that a non-trading debtor must have resided in England and by introducing a distinction between (a) fraudulent conveyances in England or elsewhere committed by traders, and (b) fraudulent conveyances pure and simple committed by non-traders, the Act of 1861 laid the foundation for further confusion and difficulties. Some additional guidance can be obtained from section 78 of the same Act which provided that judgment summonses against traders and non-traders alike were to be issued (a) out of the Court of Bankruptcy for the district in which the debtor usually lived, provided the debtor was then in England, and (b) out of the court for the district in which was the debtor's *usual or last* known abode in England, provided the debtor was not then in England. It may be assumed from this provision that a debtor, whether trader or not, must normally reside in England.[21]

Modern bankruptcy legislation begins with the Bankruptcy Act, 1869.[22] This Act, in its definition section, no longer included in the term 'property' all the real and personal estate within the realm or abroad. Instead, it suppressed every reference to the location of the property. The catalogue of acts of bankruptcy was

[15] Section 73: suffering execution to be levied for the recovery of a sum exceeding £50.

[16] Sections 71, 72, 75, 76, 77, 85: lying in prison or escaping out of prison; declaration of inability to pay debts; bankruptcy petition and adjudication in dominion court; judgment debtor summons for more than £50; debtor's petition.

[17] Section 70: with intent to defeat or delay creditors to depart the realm, or being out of the realm to remain abroad; fraudulent conveyance.

[18] Bankruptcy Consolidation Act, 1849, s. 67; Bankruptcy Consolidation Act, 1825, s. 3.

[19] Section 229. See now Bankruptcy Act, 1914, s. 167; and compare Bankruptcy Act, 1883, s. 168.

[20] Compare Topham, (1903) 19 L.Q.R. 295 at p. 296.

[21] It should be noted, further, that the Act of 1861 added debtor's petitions of traders to the catalogue of acts of bankruptcy, thus achieving uniformity in respect of the act of bankruptcy now set out in the Bankruptcy Act, 1914, s. 1 (1) (*f*). The conditions under which a creditor's petition could be brought were regulated by s. 89 of the Act of 1861.

[22] 32 & 33 Vict. c. 71.

amalgamated with the provisions regulating creditor's petitions.[23] The catalogue of acts of bankruptcy referred, in respect of conveyances to trustees and of fraudulent conveyances, to acts done in England and elsewhere, but contained no restrictions in space in so far as all other acts of bankruptcy were concerned. The provisions regulating creditor's petitions gave no indication whether the debtor had to be resident in England at the time when the act of bankruptcy was committed. Only the provisions governing debtor's summonses [24] pointed indirectly to the requirement that the debtor must have resided or traded in England.[25] Further, section 59 of the Act of 1869 defined the jurisdiction of the courts. The London Bankruptcy Court was to have jurisdiction (a) over persons residing or carrying on business in London, and (b) over persons not resident in England.

The wording of this Consolidating Act was unfortunate, for it encouraged many doubts. Formerly it was reasonably clear that a person, in order to be caught by the Bankruptcy or Insolvent Debtors Acts, must have resided or traded in England. It seemed to follow, further, that any act, in order to be an act of bankruptcy in England, must have been committed in England, unless (1) the statute provided otherwise, or (2) the act was one which was effective in England according to the ordinary rules of private international law. After the passing of the Act of 1869 it could be argued that even persons abroad were subject to English bankruptcy legislation, and that any act of the kind enumerated in the catalogue of acts of bankruptcy was an act of bankruptcy for the purposes of the Bankruptcy Act, 1869, no matter whether it was committed in England or abroad.

The Bankruptcy Act, 1883,[26] made some changes, but they affected more the form than the substance of the Act. The catalogue of acts of bankruptcy received its final form,[27] and included conveyances in England or abroad which would be void as fraudulent preferences if the debtor were adjudged bankrupt.[28] The provisions concerning creditor's petitions were separated from the catalogue of acts of bankruptcy and laid down that the debtor must have been domiciled in England, or within a year before the date of the presentation of the petition have ordinarily resided or had a dwelling-house or place of business in England.[29] This attention to the question of jurisdiction over the debtor was timely. However, by linking jurisdiction, at least in part, with the domicile of the debtor in preference to residence, by restricting the jurisdictional requirements to creditor's petitions and by separating

[23] Bankruptcy Act, 1869, s. 6.
[24] *Ibid.*, s. 6 (6).
[25] Compare Bankruptcy Act, 1861, s. 78, discussed above.
[26] 46 & 47 Vict. c. 52.
[27] *Ibid.*, s. 4, now Bankruptcy Act, 1914, s. 1 (1).
[28] *Ibid.*, s. 4 (*c*), now Bankruptcy Act, 1914, s. 1 (1) (*c*).
[29] *Ibid.*, s. 6, now Bankruptcy Act, 1914, s. 4 (1) (*d*).

them from the catalogue of acts of bankruptcy, the Act left it open whether English bankruptcy legislation took notice of acts of bankruptcy by British subjects and others, wherever committed, even if the act of bankruptcy had no direct effect in England.[30]

The Bankruptcy Act, 1914,[31] attempted to remedy this defect by inserting a provision[32] defining the categories of debtors who were subject to the Act, irrespective of the somewhat more limited provisions defining the jurisdiction of English courts in respect of creditor's petitions.[33] Inasmuch as this provision relied strongly on residence or trading in England, it was a step in the right direction. However, it defined the sphere of operation of the English Bankruptcy Act by reference to jurisdiction over the person of the debtor and failed to establish satisfactorily to what extent acts of bankruptcy committed abroad attract the operation of the English bankruptcy legislation. Thus the question to what extent acts committed abroad are acts of bankruptcy in England remained open and continued to attract the attention of English courts. It was solved with the help of rules of the conflict of laws which the courts developed gradually.

II. JURISDICTION IN BANKRUPTCY AND THE COURTS

As set out above, the Bankruptcy Act, 1883, and, with the exception of fraudulent preference, the Act of 1869, enumerating the acts of bankruptcy in terms identical with those employed in section 1 (1) of the Act of 1914, defined only the types of transactions which were affected by them. Among these, conveyances for the benefit of creditors generally, fraudulent conveyances and conveyances constituting fraudulent preferences, fell under the jurisdiction of English courts if made in England or elsewhere. In so far as the jurisdiction in bankruptcy was extended to these transactions, now contained in section 1 (1) (*a*)–(*c*) of the Act of 1914, no matter where they had taken place, it was too wide; in so far as concerned all other acts of bankruptcy, such as departing out of England, or being out of England and remaining out of England with intent to defeat creditors (section 1 (1) (*d*) of the Act of 1914), no choice of law clauses were attached. The result was that jurisdiction could be assumed on a strictly territorial basis or that it could be extended to persons and acts abroad, no matter how slender their connection with England. Thus the courts were forced to develop their own rules of conflict of laws.

1. *Rules of the Conflict of Laws: section* 1 (1) (*d*). *First Phase.*

To take the second alternative first. In the case of *Re Crispin*,[34] Mellish L.J. stated that a foreign trader committing an act of

[30] See Foote in *Clunet*, II (1884), p. 225 at p. 230.
[31] 4 & 5 Geo. 5, c. 59.
[32] Section 1 (2).
[33] Section 4 (1) (*d*).
[34] (1873) L.R. 8 Ch. 374, 380, 381.

bankruptcy in England was subject to English bankruptcy laws, even if he did not reside or carry on business here. He held that physical presence attracted the bankruptcy laws and that a departure in the sense of section 1 (1) (*d*) [35] of the Act of 1914 was an act of bankruptcy for the purpose of the Act. On the other hand, this case established that a foreigner not domiciled in England and not carrying on trade in England who quits England without having committed an act of bankruptcy cannot subsequently be made a bankrupt. For the same reason a person who remains out of England cannot be subject to the English bankruptcy laws if he is a foreigner remaining in his own home, but he is subject to these laws if he has his home or place of business in England.

(a) *Nationality and Jurisdiction in Bankruptcy.*

It will be noticed that the vague term 'foreigner', otherwise unknown in the conflict of laws, was employed by the court. It may be interpreted as a reference to the nationality or the domicile of a person, but it would appear that the Court of Appeal in *Re Crispin* relied on the debtor's nationality. This conclusion is borne out by the decision in *Ex p. Blain, re Sawers*,[36] where the principle, alleged to be one of public international law, that every State is competent to legislate within certain limits only [37] was made the basis of the jurisdiction of English courts under the Bankruptcy Act. Cotton L.J. said: 'all laws of the English Parliament must be territorial; they apply to and bind all subjects of the Crown who come within the fair interpretation of them, and also all aliens who come to this country and who during the time they are here do any act which . . . comes within its provisions' (at p. 531). James and Brett L.JJ. concurred (at pp. 527, 529), but Brett was inclined to allow jurisdiction over a foreign national domiciled in England, even if he had not committed an act of bankruptcy in England. The views expressed in these two cases were followed by the Court of Appeal in *Re Pearson*.[38]

Thus in the period between 1873 and 1892 the principles of the conflict of laws in matters of bankruptcy were enriched by the following rule:

Where the bankruptcy legislation does not provide otherwise (as it does by the proto-typical provisions which are now to be found in section 1 (1) (*a*)–(*c*)), its provisions extend—

(1) to all British subjects, no matter where the act of bankruptcy is committed;

(2) to those foreign nationals who commit an act of bankruptcy while present in England, or, possibly, who are domiciled

[35] Bankruptcy Act, 1869, s. 6 (3); Bankruptcy Act, 1883, s. 4 (1) (*a*).
[36] (1879) 12 Ch. D. 522.
[37] For the meaning of the term 'legislative competence', see *Thakur Jagannath Baksh Singh* [1946] A.C. 327 at p. 336 (P.C.).
[38] [1892] 2 Q.B. 263.

in England and commit an act of bankruptcy in England or abroad.

Lord Davey in *Cooke* v. *Chas. Vogeler Co.*,[39] like Brett L.J. before him in *Ex p. Blain*,[40] was well aware of this development when he said:

'. . . *Ex p. Crispin* laid down that a foreigner . . . in England is subject to the bankruptcy laws, but it is the act of bankruptcy which gives the court jurisdiction, and in the case of a foreigner that act of bankruptcy must be committed in this country . . .'.

(b) *Present rule: s.* 1 (2).

Inasmuch as the new rule claimed that the Bankruptcy Act applied to all British subjects irrespective of where they were domiciled or resident, and irrespective of where the act of bankruptcy was committed, it was clearly too wide. The interaction of the principle extending the Act to a limited class of aliens and of the principle claiming jurisdiction over every British subject created the balanced rule which is embodied in section 1 (2) of the Act of 1914. The general effect of section 1 (2) is not to extend the jurisdiction over foreigners appreciably beyond that previously allowed by the courts,[41] but to restrict that over British subjects to the same extent as that exercised over foreigners. This subsection is a proper rule of the conflict of laws, which determines whether the English Bankruptcy Court has jurisdiction over the person of a particular debtor. However, one effect of the codification was that the criterion whether jurisdiction exists over the person of the debtor[42] was divorced from the additional requirement in the case of foreigners that the act of bankruptcy must be committed in England. As a result, this latter requirement has been neglected at times. As will be shown in the next paragraph it cannot be contended that it has been abrogated by section 1 (2), notwithstanding the fact that the express provisions of section 1 (2) are to a great extent identical with those developed by the courts in respect of section 1 (1) (*d*).

2. *Rules of the Conflict of Laws: s.* 1 (1) (*d*). *Second Phase.*

There was, on the whole, no need to develop a further rule of the conflict of laws to determine what objects or what types of transactions were subject to English bankruptcy legislation.[43] A

[39] [1901] A.C. 102, 113, 114.
[40] (1879) 12 Ch.D. 522, 529.
[41] But note the introduction of s. 1 (2) (*c*) and (*d*), which confers jurisdiction in bankruptcy in respect of acts done in England by means of an agent carrying on business there, or by members of a firm or partnership trading in England.
[42] This jurisdiction is sometimes called jurisdiction *ratione personæ*. See Judge Hudson (dissenting) in the *Panevezys-Saldutiskis Railway Case*, P.C.I.J., ser. A/B, No. 76, at p. 44.
[43] This jurisdiction is sometimes called jurisdiction *ratione materiæ*. See Hudson, *loc. cit.*

British subject fell under the operation of the English bankruptcy laws no matter where the act of bankruptcy was committed. An alien of the limited class subject to the operation of the English bankruptcy laws had to commit an act of bankruptcy in England.[44] However, one provision (section 1 (1) (*d*) of the Act of 1914) did not fit into the scheme for it provides that an act of bankruptcy is committed—

'if with intent to defeat or delay his creditors he . . . departs out of England, or being out of England remains out of England . . . '.

Here the distinction, based upon the division of legislative competence over British subjects anywhere and aliens resident in England, broke down. Not all British subjects are resident in England, and resident aliens frequently show a desire to return home.

Yet both classes of persons appear at first sight to run the risk of committing an act of bankruptcy in England by showing a preference for their foreign home. The Court of Appeal in *Ex p. Crispin*[45] negatived this view by stating:

'If a domiciled Englishman, who is being pressed by his creditors, and has been served with a writ, were to leave England, and so to escape being served with a debtor's summons, there would be strong evidence that he intended to defeat or delay his creditors, because England is the proper, if not the only place for him to be made a bankrupt in, and if he cannot pay his debts, he has no right to avoid being made a bankrupt there.[46] But we do not think that the same reasoning applies to a foreigner who comes to England for a temporary purpose and leaves England to return to his own home . . .'.

'A foreigner not domiciled in England, and not carrying on trade in England, who quits England without having committed an act of bankruptcy, cannot be made a bankrupt upon an alleged act of bankruptcy committed out of England '.[47] 'He can be followed to his own home '.[48] It may be argued that the distinction drawn in *Re Crispin* in respect of acts of bankruptcy in the sense of section 1 (1) (*d*) of the Act of 1914[49] concerns only the burden of proof.[50] It may be said that the intention to delay or to defeat creditors is more easily established when a person resident or trading in England departs from England than in the case of a person resident and trading abroad. However, the act of

44 For the exceptions in the cases now specified in s. 1 (*a*)–(*c*), see below.
45 (1873) L.R. 8 Ch. 374 at p. 381.
46 See also *Re Brandon* (1884) 25 Ch.D. 500, 502.
47 At p. 379. See also *Ex p. Pascal, re Myer* (1876) 1 Ch.D. 509, 512 (C.A.); *Cooke* v. *Chas. Vogeler Co.* [1901] A.C. 102.
48 At p. 381. See also *Re Brandon* (1884) 25 Ch.D. 500, 502.
49 Bankruptcy Act, 1869, s. 6 (3); Bankruptcy Act, 1883, s. 4 (1) (*d*).
50 As regards burden of proof in s. 1 (1) (*d*), see *Re Wood* (1872) L.R. 7 Ch.App. 302.

bankruptcy defined in section 1 (1) (*d*) consists of an objective and of a subjective element. It would appear that the objective element is restricted to persons resident or trading in England at the time when the subjective element, the intent to defeat creditors, arises, and to those debtors resident or trading abroad who, upon leaving England, go underground abroad instead of returning to their usual place of residence or business. The objective element consists of departing out of England, or being out of England to remain out of England. In the first place, it would seem that a person not resident or trading in England who, being out of England remains out of England, cannot commit an act of bankruptcy in the sense of section 1 (1) (*d*), even if he intends to delay or defeat his creditors. It would seem to follow, in the second place, that a person who departs out of England, where he is not domiciled and after he has ceased to reside or trade in England, does not usually commit an act of bankruptcy either, if he goes home or sets up a new home abroad, seeing that both situations are treated in the same provision. The only exception would appear to be that the debtor was resident or trading in England when the debt arose, or was about to mature, and the debtor subsequently returned to his former home country or any other country abroad, having meanwhile given up his domicile, residence or business in England. To hold otherwise would mean to impose upon persons not resident or trading in England, a duty to appear in England in order to face their creditors, or to remain in England if they have reason to believe that there are English creditors.

An examination of the practice of English courts does not yield a clear-cut result. In most cases where section 1 (1) (*d*) or its forerunners were invoked the debtor was a trader domiciled and carrying on business in England [51] who had gone abroad where he had no residence or business. In these cases it was held uniformly that the departure or the sojourn abroad coupled with the inevitable delay suffered by the creditors was an act of bankruptcy, seeing that a person must be deemed to have intended the natural consequences of his acts. However, in several cases the debtor carried on business in England and abroad and left England in order to return to his foreign house of trade.

In *Williams* v. *Nunn* [52] the debtor traded in England and in Ireland, where he resided. However, during the whole time of his residence in Dublin he continued to keep his former house in London; his name was upon the door and his wife and family resided there continually. The petition was heard upon the debtor's departure for Ireland. Chambre J. directed the jury that the

[51] See, *e.g.*, *Re Woodier* (1739) Bull.N.P. 39; *Raikes* v. *Poreau* (1786) Cooke's Bankrupt Laws 80; *Re Osborne* (1813) 2 V. & B. 177; *Ex p. Kilner, re Bryant* (1837) 3 M. & A. 722; *Ex p. Bunney* (1857) 1 De G. & J. 309; *Ex p. Goater, re Finney* (1874) 30 L.T. 620; *Ex p. Campbell, re Campbell* (1887) 4 Mor. 198.

[52] (1809) 1 Taunt. 270.

statute was not restrained to such persons only who resided in England but extended to all natural born subjects.[53] Upon a motion for a new trial, Mansfield C.J. expressed himself more cautiously. He said: 'It does not exactly appear how long he was here before he again returned to Ireland, but on the facts of this case he is as little a resident out of this country and as little entitled to take that objection as can well be supposed. . . . While he is in England, a creditor is, as plaintiff thinks, about to arrest him. He instantly quits England and returns to Ireland. Is not this an act of bankruptcy? . . . he may be arrested here and . . . *if he lies in prison for two months he will be a bankrupt. To avoid an arrest he runs away*, and it is said that this makes a distinction. I will suppose that in returning to Ireland he is going to his house or place of trade; but he does not go as for the purpose of going home; by his own confession it is to avoid arrest. If he was not liable to the bankrupt laws of this country immediately upon his landing here, how long was it necessary that he must stay before that liability would accrue? Everyman coming hither knows that he must be subject to the law, and any personal contact which he makes may be enforced according to law. It seems . . . to be . . . a necessary consequence . . . that *if to avoid the process of the country he goes away so that no proceedings by action can be taken against him he shall be nevertheless liable to the other mode which the law points out, namely, a commission of bankruptcy*'.

The same question arose in *Windham* v. *Paterson*[54] where Lord Ellenborough said: 'He might be going for the very purpose of procuring funds for the payment of his creditors. If he departed with a bona fide intention to return he committed no act of bankruptcy, although in fact he never did return. No doubt a trader must be presumed to contemplate the consequences of his absence. *A creditor certainly has a right to the person of his debtor for the purpose of application and importunity*,[55] but still, if he departs with an honest intention compatible with business he does not commit an act of bankruptcy'.

Gibbs C.J. in *Warner* v. *Barber*[56] expressed himself in the same sense when he said:

'That (he) withdrew himself from such creditors as were disposed to arrest him is clear from the facts; the question is: was the going abroad an act of bankruptcy? It is undeniable that (his) creditors were delayed. But if there be no intent to delay, the circumstance of departing from the realm whereby delay is occasioned is no act of bankruptcy. (He) had a right to go abroad to look after his property. If he went abroad from this motive, though delay was a consequence, yet, if not intended, it is not an act of

[53] Mansfield C.J. observed that it also extended to aliens.
[54] (1815) 1 Stark. 144; 2 Rose 466.
[55] See also *Holroyd* v. *Whitehead* (1814) 3 Camp. 530.
[56] (1816) Holt N.P. 175.

bankruptcy, but *if he went abroad from the other cause, the fear of arrest*, though it concurred with the first and justifiable motive . . . it *is an act of bankruptcy* '.

It appears that in these cases the courts were guided by two considerations. First, by departing the realm, the debtor deprived his creditors of their most effective means, at that time, of obtaining a commission of bankruptcy. It was provided by 1 Jac. 1, c. 15, and by subsequent Bankruptcy Acts until the modern codification in 1869 [57] that lying in prison for a specified period as a result of being arrested and committed to prison for debt, of any attachment for non-payment of money or of detention for a debt, was an act of bankruptcy. By his departure the debtor effectively prevented the creditors from taking steps towards obtaining a commission of bankruptcy. The introduction of debtor's summonses [58] and the possibility, created in 1883,[59] of serving bankruptcy notices abroad removed the greater part of the obstacles which formerly prevented the courts from assuming jurisdiction in bankruptcy once the debtor had departed the realm. Second, the provisions of the Common Law Procedure Act, 1852, c. 76, ss. 18, 19, allowing service of notices of writs abroad, now developed in Order XI of the Rules of the Supreme Court, enabled creditors in a great number of instances to take proceedings by action against debtors who had gone abroad. This removed the additional ground, set out in *Williams* v. *Nunn*,[60] for treating a debtor's departure from England as an act of bankruptcy. As a result it was to be expected that the courts would adopt a more lenient attitude towards debtors who departed from England. This change becomes apparent in those cases where the debtor, although domiciled in England, had a residence abroad to which he returned. In *Ex p. Brandon, re Trench*,[61] the Earl of Selborne L.C. said:

' The question whether such an act of bankruptcy has been committed must be considered with regard to the circumstances of the foreign residence of the debtor. . . . Assuming that he retained his English domicile, still the original constitution of his foreign residence cannot, as far as the evidence goes, be said to have taken place with the intention of defeating or delaying his creditor.

' *I cannot leave out of consideration that France is a civilized country in which creditors can sue their debtors.* It does not appear that the petitioning creditors have been in any way baffled by the debtor in the pursuit of their remedy against him. Can we, upon

[57] See 6 Geo. 4, c. 16 (1825), s. 5; 12 & 13 Vict. c. 106, s. 69; 24 & 25 Vict. c. 134, s. 71.
[58] Now s. 1 (1) (*g*) of the Bankruptcy Act, 1914.
[59] Bankruptcy Rules, 1883, r. 148 (see 53 L.J.Ch. 2), now Bankruptcy Rules, 1915, r. 158. It is interesting to note that *Re Crispin* was decided prior to the introduction of this provision.
[60] (1809) 1 Taunt. 270.
[61] (1884) 25 Ch.D. 500 (C.A.).

the principle that man must be taken to intend the natural consequences of his acts, say that he remained out of England with intent to defeat or delay his creditors? *If a debtor had left this country in order to place himself beyond the reach of its laws*, the presumption that by so doing he intended to defeat or delay his creditors might arise, but the present case is entirely different'.

Thus it would appear that in the absence of special circumstances a debtor who returns to his foreign residence where he can be sued and served with notices concerning proceedings in England does not, and possibly cannot, commit thereby an act of bankruptcy in the sense of section 1 (1) (*d*). This view is supported by the decision of the Court of Appeal in *Ex p. Langworthy, re Langworthy*.[62] Here the debtor, who was domiciled in England and had a residence in Argentina, where he had a business, left England for Buenos Ayres but broke his journey in France and Portugal. In these circumstances Lindley L.J. said: '. . . no doubt the debtor meant to go to Buenos Ayres to his property there, but he went to France and to Portugal with intent to defeat or delay the creditor who was before the court'.

The principle arising from these cases may be formulated in one of two ways, one of which stresses the subjective, the other the objective element in section 1 (1) (*d*) of the Act of 1914.

(1) It may be said that in the case of a debtor resident or trading in England a departure from England raises a presumption that the debtor intended to defeat or delay his creditors and that no such presumption arises in the case of a debtor, whether trading in England or not, who returns home. In the latter case evidence of the intent to delay or defeat creditors must be adduced.

(2) Alternatively it may be said that in the absence of special circumstances the act of returning home, if the debtor resides abroad, is not a departure in the sense of section 1 (1) (*d*) and that a debtor residing abroad cannot commit an act of bankruptcy in the sense of section 1 (1) (*d*) unless he goes abroad without returning to his home.

The combined effect of the cases appears to be that in spite of the somewhat obscure language employed by the court in *Re Crispin*—notably its use of the terms 'Englishman' and 'foreigner'—a further rule of the conflict of laws was added in respect of what is now section 1 (1) (*d*). Owing to the nature of the act of 'departing out of England, or being out of England, to remain out of England', the rule combines the features of a rule of jurisdiction in respect of the person and of a rule concerning the nature of the subject-matter.

In its original form, before section 1 (2) of the Act of 1914 introduced a uniform principle of jurisdiction in respect of the person of the debtor, it may perhaps be paraphrased as follows:

[62] (1885) 3 T.L.R. 544.

In order to commit an act of bankruptcy in the sense of section 1 (1) (*d*)—

1. A British subject or alien domiciled [63] and resident in England must have left England with intent to delay or defeat his creditors. This intent is presumed if creditors have been in fact delayed.

2. A British subject domiciled but not resident in England must have left England for a destination other than his ordinary residence or place of business.

3. An alien not domiciled in England and not resident or carrying on trade in England must have left England after having committed an act of bankruptcy in England.[64] But

4. An alien not domiciled in England and not resident or carrying on trade in England who has left England before committing an act of bankruptcy does not commit an act of bankruptcy by departing from or by remaining out of England.

The first and second propositions were discussed in *Re Brandon* [65] and in *Re Langworthy* [66] where the court pointed out that the foreign residence of the debtor must be considered. The third proposition was originally laid down in *Re Crispin* (*supra*) and was followed in *Ex p. Gutierrez* [67] which involved a debtor's summons against an alien who had come to England for a temporary purpose and had then returned home. James L.J. said : ' I should not have thought it possible, after the distinction between an Englishman and a foreigner had been so clearly explained by Mellish L.J. in *Ex p. Crispin* that such an order could have been made '.[68]

Section 1 (2) of the Act of 1914 modified the rule only in so far as it abolished the distinction between British subjects and aliens and clarified doubts by replacing ' domicile ' by ' residence '. The term ' person ' must therefore be substituted for ' British subject ' and ' alien '. There is *jurisdiction* over British subjects and aliens alike if at the time when the act of bankruptcy they (a) were personally present in England or (b) were ordinarily resident or had a place of residence in England, or (c) carried on business in England personally or by means of an agent or manager, or (d) were members of a firm or a partnership which carried on business in England.

An *act of bankruptcy* in the sense of section 1 (1) (*d*) is committed if with intent to delay or defeat their creditors they depart from England or remain out of England in the circumstances defined in clauses (*a*)-(*d*) of section 1 (2). It has been shown

[63] It appears that in the cases discussed above, and in particular in *Re Crispin* and in *Re Brandon*, the term domicile was not necessarily used in its technical sense.

[64] Thus the effect of s. 1 (1) (*d*) is purely nominal in this case.

[65] (1884) 25 Ch.D. 500, 502.

[66] (1885) 3 T.L.R. 544.

[67] (1879) 11 Ch.D. 298.

[68] At p. 312.

that a person residing abroad who fulfils the requirements establishing jurisdiction according to section 1 (2) (*c*) and (*d*) does not easily commit the act of departing out of England if he carries on his business by means of an agent or manager, or if, while residing abroad, he is a member of a firm or a partnership carrying on business in England. Certainly such a person does not commit an act of bankruptcy by remaining out of England. The requirements of section 1 (2) and section 1 (1) (*d*) overlap, but they do not coincide.

3. *Section* 1 (1) (*a*)–(*c*).

We must now turn to section 1 (1) (*a*)–(*c*) of the Act of 1914 whereby certain transactions in England or elsewhere are declared to be acts of bankruptcy for the purpose of the Act. It is clear, in the first place, that this choice of law clause does not define the circle of persons who are affected by the operation of the provision. This was not done until 1914, when the rule of the conflict of laws which is now embodied in section 1 (2), and which was discussed above, was made to extend to the transactions mentioned in section 1 (1) (*a*)–(*c*). It is clear, in the second place, that in the absence before 1914 of a rule of the conflict of laws determining jurisdiction over the person of the debtor the choice of law clauses in respect of the transactions set out in section 1 (1) (*a*)–(*c*) were too wide. Here again, the Court of Appeal in *Re Crispin* provided the corrective by adding a proviso to the choice of law clause. Not every conveyance in England or elsewhere of the kind enumerated in section 1 (1) (*a*)–(*c*) is an act of bankruptcy. No doubt it is an act of bankruptcy if carried out in England, but if executed abroad, it is so only if the conveyance is to operate according to English law. This was the view expressed by Mellish L.J.,[69] who drew from this premise the following conclusions:—

Only a conveyance executed abroad by a person domiciled in England is caught by the Act, being a conveyance governed by English law. A conveyance executed abroad by a person domiciled abroad is not an act of bankruptcy, being governed by foreign law. The House of Lords in *Cooke* v. *Chas. Vogeler Co.*[70] approved the rule and the Court of Appeal in *Re Debtor* (*No.* 836 *of* 1935)[71] followed this view.

Nevertheless, it would appear that the choice of law clause in its amended form, like every choice of law clause which is expressed in terms of domestic law and not of the conflict of laws, has only partially achieved its purpose. As the law now stands, a conveyance abroad of movables in England may be an act of bankruptcy for the purpose of section 1 (1) (*a*)–(*c*) if executed by a person

[69] (1873) L.R. 8 Ch.D. 374, 380.
[70] [1901] A.C. 102, 113.
[71] [1936] Ch. 622.

domiciled in England. Again, every conveyance abroad of immovables, and possibly of individual movables, in England, whether executed by a person domiciled in England or abroad, may constitute an act of bankruptcy. On the other hand, no universal assignment abroad by a person domiciled abroad of movables in England is caught by the Act, notwithstanding that the conveyance may operate in England as a universal assignment.[72] This omission could have been remedied if the words of Mellish L.J. had been understood to include every conveyance which is to operate according to English law, including its rules of the conflict of laws. However, it is probably too late to remedy this defect and certainly too late to substitute for the test laid down by Mellish L.J. to the effect that the conveyance must operate according to English law, the more general criterion that it must operate in England, *i.e.*, according to English domestic law or the English rules of conflict of laws. In its present form the rule in *Cooke* v. *Chas. Vogeler Co.* (*supra*) is perhaps to be explained on the ground that it purports to apply the principle of the division of legislative competence. If the bankruptcy laws apply to all British subjects who fulfil the conditions of section 1 (2), and if English law governs all British subjects (which it does not), then the rule is in accordance with principle. The same applies to the converse rule applicable in the case of aliens. However, the premise is false, since British nationality does not attract the application of English law.

Once the original choice of law clause in the Bankruptcy Acts of 1869 and 1883 had been thus restricted, the need for a choice of law clause determining jurisdiction over the person of the debtor had practically disappeared, but it would seem that the 'negative and restrictive provision'[73] now contained in section 1 (2) of the Act of 1914, while creating a uniform jurisdiction in respect of the persons subject to the Act for all situations covered by section 1 (1), has not altered the substance of the choice of law clause in respect of the type of the transaction in any substantial degree.

To sum up:

(1) Section 1 (2) provides a rule of the conflict of laws determining the jurisdiction over the person of the debtor which applies to all acts of bankruptcy enumerated in section 1 (1).
(2) Section 1 (1) (*a*)–(*c*) is limited by a rule of the conflict of laws in respect of the type of transaction covered by the Act.
(3) Section 1 (1) (*d*) is limited by a separate rule of the conflict of laws which combines the features of a rule determining the type of transaction and the class of debtor covered by the Act.

[72] But see *Dulany* v. *Merry* [1901] 1 Q.B. 536.
[73] *Cooke* v. *Chas. Vogeler Co.* [1901] A.C. 102, 113, *per* Lord Davey.

III. RECENT TRENDS

In the light of the principles developed above it is now possible to examine the conclusions of the Court of Appeal in *Re a Debtor (No. 335 of 1947)*.[74]

A Roumanian citizen, who had a place of residence in England where he carried on a business, appealed against assessments in respect of unpaid excess profits tax. On the day when the assessments were confirmed he left England for Eire and did not return. He sent his wife a power of attorney in exercise of which she sold the business.

The Crown obtained an order giving leave to serve a bankruptcy petition out of the jurisdiction in accordance with rule 158 of the Bankruptcy Rules, 1915. This order was discharged on the ground that leave to serve out of the jurisdiction could not be granted seeing that the debtor was a foreigner residing abroad and therefore not subject to the jurisdiction of the bankruptcy laws.

The Court of Appeal held that there was jurisdiction.

The case involved three questions. First, does the Bankruptcy Act, 1914, extend to aliens? The wording of section 1 (2) of the Bankruptcy Act answered this question in the affirmative. Second, was the debtor a 'debtor' in the sense of section 1 (2) of the Act which provides: '. . . the expression "a debtor", unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him . . . (*c*) was carrying on business in England, personally, or by means of an agent or manager'? The Court of Appeal held that notwithstanding that he had left England before the act of bankruptcy occurred and had sold the business, he was so carrying on business for he had unpaid debts. The court relied on the combined operation of the Married Women's Property Act, 1882, s. 1 (5), the Bankruptcy and Deeds of Arrangement Act, 1913, s. 12 (1), the Bankruptcy Act, 1914, s. 25, as well as on *Re Dagnall*[75]; *Re Clark*.[76] Third, was an act of bankruptcy in the sense of section 1 (1) (*d*) of the Bankruptcy Act committed by the debtor, an alien, who, having given up his business and his residence in England, remained out of England? The Court of Appeal had no doubt that a strong prima facie case had been made out.[77]

1. *Jurisdiction in respect of the person of the debtor.*

As shown above, it was recognised more than seventy years ago that the bankruptcy laws extend to aliens. Section 1 (2) of the

[74] [1948] 2 All E.R. 533; 64 T.L.R. 446.
[75] [1896] 2 Q.B. 407.
[76] [1914] 3 K.B. 1095.
[77] The petition did not rely on the first part of s. 1 (1) (*d*), *viz.*, that the debtor had departed out of England with intent to defeat or delay his creditors. This ground was excluded by s. 4 (1) (*c*), in view of the delay in the presentation of the petition.

Act of 1914 which repeats this rule is merely declaratory of an established practice. Inasmuch as section 1 (2), which defines the term 'debtor' for the purpose of the Act, added the requirement that the debtor must fulfil a residence qualification or must have traded in England, the Act adopted and extended a principle enunciated in older statutes and in previous decisions where it was restricted to aliens. It now appears that its express application to British subjects has opened a dangerous path. The principle purported to reflect the division of jurisdictions among different countries, as derived from a division of legislative competence. The Court of Appeal held that it was impossible 'that the reference to carrying on business in the definition of a debtor is to be construed in a different way from the corresponding reference in relation to married women' (section 125, which was repealed by 25 & 26 Geo. 5, c. 30, Second Schedule) and thus extended the meaning of 'carrying on business' in England to that of 'having unpaid debts'[78] in England.

These considerations, taken from the domestic rule as to whether or not a woman in England was to remain subject to the Bankruptcy laws after having ceased to trade, are applied by the Court of Appeal to determine international jurisdiction where the question was whether a trader who had given up his business and had gone abroad remained subject to English courts. The work of the courts during the past seventy years is disregarded, restricting and defining the conditions under which a foreigner is subject to English bankruptcy law—described above as the 'First Phase'—and a situation is restored which existed before the decision in *Re Crispin*. The words of James L.J. in *Re Gutierrez* (*supra*) ring true once again: 'I should not have thought it possible, after the distinction between an Englishman and a foreigner had been so clearly explained by Mellish L.J. in *Ex p. Crispin* that such an order could have been made'.

The fact that the Married Women's Property Act had not been passed when *Re Crispin* was decided does not appear to affect the issue for the reason set out above.

2. *Jurisdiction in respect of the type of transaction.*

(a) *Section* 1 (1) (*d*):

By reading the words concerning jurisdiction over the person of the debtor of section 1 (2) in their extended form as developed by the Court of Appeal into the relevant subsection (*d*) of section 1 (1), which defines the acts of bankruptcy, the court precluded itself from considering the rule of the conflict of laws concerning the type of transaction which was developed during what has been described above as the 'Second Phase'.

At the time when the alleged act of bankruptcy was committed

[78] At p. 537.

by remaining out of England with intent to defraud his creditors, the appellant was neither present nor resident in England, and even if it should be assumed with the Court of Appeal that for the purpose of establishing jurisdiction according to section 1 (2) the appellant must be deemed to be carrying on business in England because he had unpaid debts there, it cannot be assumed that he must be deemed to be carrying on business *in person*. Personal trading, however, is necessary in order to constitute an act of bankruptcy in the sense of section 1 (1) (*d*), while trading by means of an agent or through members of a firm or partnership and, it is believed, by means of a notional business, does not.

The authorities are somewhat inconclusive seeing that they either date from the time before the decision in *Re Crispin*,[79] or that the debtor, being domiciled and ordinarily resident in England went underground abroad after having departed in good faith on legitimate business.[80] However, it would appear that, in the absence of continued personal trading in England, no act of bankruptcy is committed if the debtor returns to his home abroad and remains there, if he can be reached. It may therefore be relevant whether the debtor returned to his established residence abroad and whether he could either be served there with a bankruptcy notice arising out of an act other than that mentioned in section 1 (1) (*d*), or whether notice of a writ could be served upon him and whether he could be sued there. In the absence of a previous residence abroad and failing the means of reaching him or enforcing a claim there, it may well be that an act of bankruptcy in the sense of section 1 (1) (*d*) was committed. But it would appear that in the absence of evidence to this effect the appellant had not committed an act of bankruptcy in the meaning of section 1 (1) (*d*). To assume the contrary would be to act in the teeth of the decision of the same court in *Re Brandon* (*supra*).

As shown above, it is a well-established principle 'that a foreigner . . . in England is subject to the bankruptcy laws, but it is the act of bankruptcy which gives the court jurisdiction, and in the case of a foreigner that act of bankruptcy must be committed in this country'.[81] The Court of Appeal held that for this proposition to be true today 'there must be implied somewhere in the relevant words a restriction of the operation of these provisions in the case of a person being out of England who is not a British subject. . . . it is quite impossible to make such an implication and the argument that a British statute does not apply to an act done by a foreigner out of this country seems to me to be entirely misplaced, because in this case the British legislature has said that

[79] (1873) L.R. 374.
[80] Compare *Ex p. Kilner, re Bryant* (1837) 3 M. & A. 722; *Ex p. Bunney* (1857) 1 De G. & J. 309 at p. 314, with *Re Campbell* (1887) 4 Mor. 198.
[81] *Per* Lord Davey in *Cooke* v. *Chas. Vogeler Co.* [1901] A.C. 102, 113.

it shall apply '.[82] However, as shown above, the rule concerning jurisdiction over the person of the debtor laid down in section 1 (2) did not add an extension of the Bankruptcy Act to foreigners by equating it to the jurisdiction exercised over British subjects. Generally speaking, it did the reverse, by restricting the jurisdiction over British subjects to the limit of jurisdiction exercised over foreigners. Moreover, it did not extend English jurisdiction as developed in respect of the nature of the act of bankruptcy.

(b) *Section* 1 (1) (*a*)–(*c*).

The rules of the conflict of laws concerning the types of transactions covered by the Act as developed by the courts in respect of section 1 (1) (*a*)–(*d*) were not touched by the Act of 1914. This was recognised by the Court of Appeal inasmuch as Lord Greene discussed at length the relevant passages in *Cooke* v. *Chas. Vogeler Co.* (*supra*) and *Re Debtors* (*No.* 836 *of* 1935) (*supra*) which laid down that the conveyances envisaged in section 1 (1) (*a*)–(*c*) must operate according to English law. If this rule was not abrogated by the Act of 1914 it would appear that the rule of the conflict of laws developed with regard to section 1 (1) (*d*) by the decisions in *Re Crispin*, *Ex p. Pascal*, *Re Brandon* and *Ex p. Gutierrez* and others should also have been taken into account, for the petition before the court was based on section 1 (1) (*d*) and not on section 1 (1) (*a*)–(*c*).

The observations of the court in respect to *Cooke* v. *Chas. Vogeler Co.* and *Re Debtors* (*No.* 836 *of* 1935) to the effect that conveyances abroad in order to be caught by section 1 (1) (*a*)–(*c*) must operate according to English law were merely obiter. However, in view of the criticisms raised above when discussing the rule laid down in these cases, it is interesting to note that by stressing the importance of an English domicile, the sphere of operation of section 1 (1) (*a*)–(*c*) remains severely restricted. The hope that universal assignments by a person domiciled abroad of movables in England may be caught by section 1 (1) (*a*)–(*c*) would thus appear to be more remote than ever, although in every other respect such an assignment will be recognised here. However, in two passages Lord Greene referred to the test whether the assignment is intended to operate by the laws of England.[83] Since intention is irrelevant in the conflict of laws regarding movables, and since it is agreed that universal assignments of movables are not governed by the *lex situs*, there is some ground for holding that these words have the following meaning: a conveyance by a person domiciled abroad may be caught by section 1 (1) (*a*)–(*c*) if the assignor intends to assign movables in England and the assignment operates here whether in virtue of English domestic law or of

[82] [1948] 2 All E.R. 533 at p. 539.
[83] [1948] 2 All E.R. 533 at pp. 540, 542.

foreign law which is applicable according to the English rules of the conflict of laws.

Following *Ex p. Blain, re Sawers*,[84] the court discussed the question whether an English statute which extends to a limited number of foreigners is contrary to the comity of nations, and found that it was not. This question can arise only if we accept the original Dutch doctrine which assumed a division of legislative competence. Today this doctrine is on the whole discarded, and it is recognised that each country is free to determine when its own law and when foreign law is to be applied. The only limit is that imposed by international law which prohibits illegal discrimination and requires the observance of the minimum standards of civilised nations. Be that as it may, an English court is bound to apply an English statute even if contrary to international law, but if possible the statute must be interpreted so as not to conflict with international law.[85] Nevertheless, as shown above, the doctrine may be still useful where it is necessary unilaterally to limit the application of English administrative, criminal and bankruptcy law, and the development traced here has been much influenced by it. However, no cases can be found where foreign countries have complained when the usual limits of jurisdiction over persons and transactions were exceeded. The Court of Appeal examined this question in the light of possible violations of the comity of nations. It may be that this term embraces the principles here discussed under the head of international law. If the court wished to refer to the principle of comity developed by the Dutch school where it served to explain why foreign law must be applied by the courts of the forum, it is difficult to see how this principle can be applied here.

To sum up: If the principles here advanced are applied to *Re a Debtor* (*No.* 335 *of* 1947),[86] it follows that English courts had no jurisdiction on the ground that there was no jurisdiction—

(a) over the person of the debtor according to section 1 (2) of the Act of 1914; and

(b) in respect of the transaction according to section 1 (1) (*d*) of the same Act, in the absence of evidence of the nature indicated above (III (2) (a)).

In these circumstances it is impossible to seek for an alternative remedy in the provisions of section 122 of the Act of 1914 (which still applies in Eire), according to which bankruptcy courts in the Empire act as auxiliaries to each other. There is also little comfort in the advice given by the Court of Appeal in *Re Crispin* (*supra*)[87]

[84] (1879) 12 Ch.D. 522, 527, 529.
[85] *Mortensen* v. *Peters* (1906) 14 S.L.T. 227; 43 S.L.R. 872. Lauterpacht in (1939) 25 Transactions of the Grotius Society, 51 ff.
[86] [1948] 2 All E.R. 533; 64 T.L.R. 446.
[87] At p. 381.

and in *Re Brandon* (*supra*)[88] to the effect that the creditor can follow the debtor to his own home, seeing that the claim in the case under review was based on a revenue law which may possibly be disregarded abroad.

K. Lipstein*.

[88] At p. 503.

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REGISTERED CONVEYANCING AND THE LAND LAW—A REPLY

THERE has been so little discussion of the principles of registration of title in England that it is worth while pursuing further some of the points which have emerged from my review [1] of Professor Potter's *Principles of Land Law under the Land Registration Act* and of his article [2] in reply to my criticisms. I shall therefore deal, as briefly as possible, with the five major issues indicated in Professor Potter's article, ignoring many of the minor points which might otherwise distract attention from what is really important.

First, as to the nature of the interest vested in the registered proprietor. The view which is, perhaps, more generally accepted is that this interest is an estate the nature and incidents of which are governed by the ordinary rules of common law, equity, and statute, as modified by the Land Registration Act. Professor Potter, as I understood his book, contended that the nature and incidents of this interest were governed exclusively by the Land Registration Act. It now appears, however, that I was mistaken in my interpretation of his attitude. We are now told [3] that the destruction of the 'old common law owner beneficially entitled' does not necessarily mean that the registered proprietor has no common law estate, and that although the learned author finds it 'difficult to see what sort of a ghost of a common law estate is left . . . it may be material for purposes of enjoyment as distinct from disposition' [4]—a surprisingly material ghost.

If the matter were to remain there, it would be sufficient, and justifiable, to claim that Professor Potter now accepts the first of the two views propounded in the last paragraph. But the position is not yet so simple. 'The real issue', he now writes, 'is whether a registered proprietor has a statutory estate and, if he has, whether he also has a common law estate conferring rights of disposition independently of the Act but affecting the legal estate. These propositions are, of course, severable.' This passage, though not free from ambiguity,[5] seems to indicate that Professor Potter is now propounding a theory of dualism, whereby the proprietor has at the same time two separate interests, a 'statutory estate' and a 'common law estate'. The phrase 'statutory estate' is not

[1] (1949) 12 Mod.L.R. 139.
[2] *Ibid.*, p. 205.
[3] *Ibid.*, p. 206.
[4] *Ibid.*, p. 207.
[5] It is just possible that the two propositions, taken together, are intended to represent my views, and that Professor Potter still maintains that the registered proprietor has a 'statutory estate' only. But this latter view is so incompatible with his recent statements (referred to above) that I cannot believe that it represents his present attitude.

part of the accepted language of the law, and in consequence its meaning suffers from the uncertainty of novelty. Although the learned author appears to use it, perhaps by oversight, as the exact equivalent of 'registered estate', it must connote something other than merely 'the interest vested by statute in the proprietor', for such interest admittedly includes a 'common law' interest of sorts, if only for the rather important purpose of enjoyment, and in any case the nature of this interest is the very matter in issue. Similarly it ought to differ from a 'statutory power to dispose of an estate', and from a 'statutory title to an estate', though Professor Potter's discussion of section 69 (4) and *Chowood* v. *Lyall* [6] raises doubts whether these distinctions are always preserved. Probably the phrase means 'an interest the nature and incidents of which are determined exclusively by the Land Registration Act'. In that case, 'common law estate' probably means the legal estate of ordinary conveyancing, governed by the ordinary rules of common law, equity and statute, less those incidents (or their equivalents) which are part of the 'statutory estate'. But why the proprietor should have, at one and the same time, in his own right, as absolute, beneficial owner, two separate interests, and why those two interests are not permitted to merge into one, is a problem for which I can offer no solution.

In his second and third sections, Professor Potter deals with my analyses of the position, in regard to registration, of legal easements and of leases containing absolute prohibitions against alienation. Now the learned author had insisted, and still insists, that every interest in registered land must necessarily fall within one of three categories, 'registrable interests', overriding interests, minor interests. It was this theory which I sought to challenge, and the two analyses in question were used simply to demonstrate what I considered to be its invalidity. Thus, by showing that a legal easement is not necessarily an overriding interest within section 70, I hoped to show that the three categories were not rigid, and by showing that a lease containing an absolute prohibition against alienation created an interest that was neither a 'registrable interest' nor an overriding interest nor a minor interest, I hoped to show that the three categories were not exhaustive. A classification which is neither rigid nor exhaustive is unsatisfactory for the purposes of exposition and dangerous as a key to interpretation. Unfortunately, I cannot have expressed myself with adequate clarity, for Professor Potter does not notice my major criticism, and, indeed, his article is based on the assumption that the validity of his three categories is unchallenged and unchallengeable. To take only one illustration, assuming that I am right in stating that a legal easement noted on the register of the servient tenement is not, technically, an overriding interest, Professor Potter takes it for granted that it must therefore be a 'registrable interest' so far as

[6] Pp. 206–7.

the dominant tenement is concerned,[7] and then proceeds to puzzle over the kind of ' registrable interest ' so created.[8]

It is unfortunate that the first category is so ambiguously named. Although it is used in the Rules, the phrase ' registrable interest ' does not occur in the Act, the nearest statutory equivalent being the ' interests in land in respect of which a proprietor can be registered ' of section 2 (1), the section which Professor Potter uses as the origin of and authority for his three categories. Both phrases indicate those interests which are capable of registration, but I doubt whether Professor Potter would admit all such interests into his first category. Ignoring the fact that all legal estates in England are capable of registration, what about the estate of a squatter whose possession has barred the right of the registered proprietor? It is an overriding interest within section 70, yet it is also capable of registration. Conversely, the phrase would suggest that an estate already registered is necessarily excluded. Yet it is quite possible that Professor Potter really intends to include only interests actually registered, though the distinction is not always maintained.

Moreover, it is submitted with great respect that section 2 (1) cannot bear the meaning which Professor Potter places upon it. That section reads as follows: ' Estates capable of subsisting as legal estates shall be the only interests in land in respect of which a proprietor can be registered, and all other interests in registered land (except overriding interests . . .) shall take effect in equity as minor interests '. Now the first clause obviously does not mean either that all legal estates are capable of registration, or that estates so ' registrable ' or registered are the only estates capable of subsisting as legal estates. There is nothing here to prevent an estate subsisting as a legal estate although it is not a ' registrable interest ', nor to prevent an overriding interest from subsisting as a legal estate, nor to prevent a legal estate, whether ' registrable ' or not, from being an overriding interest. The main subject of the second clause, ' all other interests ', is clearly to be taken in apposition to the main subject of the first clause, ' estates capable of subsisting as legal estates ', so that the second clause simply amounts to this: interests not capable of subsisting as legal estates (either because they cannot be legal or because they are not estates) are to take effect in equity as minor interests, unless (as, *e.g.*, in the case of rights in process of acquisition by prescription) they are overriding interests. The whole section is merely a direction to the Registrar: ' You must not register an interest not capable of subsisting as a legal estate, but treat it as a minor interest (or as an

[7] *Ibid.*, pp. 207–8.

[8] If it is a ' registrable interest ', it is a ' legal estate ' within the unfortunate definition in s. 3. Whether it is or is not a ' registrable interest ' is governed by s. 19 (2): If the title to the dominant tenement is not registered, the title to the easement cannot be registered (*i.e.*, it is not a ' registrable interest '); if the title to the dominant tenement is registered, then the easement is registrable by entering it in the property register. In either case it is a valid legal easement.

overriding interest if it happens to be one) '. The essential classification is the traditional contrast between legal estates and other interests, whether legal or equitable, strained somewhat by the extremely wide definition of ' legal estate ' in section 3. There is no indication of some novel triple classification such as Professor Potter suggests, and even if such a classification were in the mind of the draftsman, he has clearly abandoned it in later sections, as I tried to show in my review.

Of the various detailed points raised by Professor Potter in this part of his article, one is sufficiently important to warrant further discussion, the apparent conflict between section 19 (2) and section 70 (3). By the former section, the burden of an easement ' shall ' be noted in the register of the servient tenement, whereas by the latter, the burden ' may ' be noted at the discretion of the Registrar. Fortunately, further examination of the two sections quickly removes this difficulty. Section 19 (2) is concerned exclusively with express grants, which must be by registered disposition. If an easement is so created, it shall be automatically noted as part of the ordinary process of the Registry; there is nothing ambiguous about the word ' shall '—if necessary it would be enforced by mandamus. Easements arising in this way, being thus noted, never become overriding interests, and section 70 (3) never applies to them. But legal easements may arise in other ways, as by prescription or under a deed of grant executed before the first registration of the servient tenement. Here there is no registered disposition: section 19 does not apply, and there is no automatic noting. Such easements in the first instance are thus overriding interests to which section 70 (3) applies, and though they may be noted the Registrar has a complete discretion whether to note them or not.

Section 101 deals with the manner of effecting those ' permissible ' dispositions which are not covered by earlier sections. Professor Potter suggested that this section should be so interpreted as to limit its application to interests arising under settlements and trusts for sale, and I took it to be an essential link in his argument that because section 101 (2) mentions overriding without any reference to protection, therefore interests created under the section can be overridden even though they are protected on the register by notice or otherwise. I sought to challenge this link by pointing out that by section 101 (2) these interests are minor interests, that by section 101 (3) minor interests may be protected by notice, etc., and that by section 52 (1) interests protected by notice could not be overridden unless overridden *independently of this Act*. It seemed to follow that it is impossible to say that all interests under section 101 can be overridden even if protected by notice, for the express words of section 52 must govern the silence of section 101 (2), and the words I have italicised prevent section 101 from creating by implication a special overriding power. As there is

thus no reason for excluding interests like easements for life from the section, so there is no reason for restricting its application to settlements and trusts for sale. Professor Potter now says that section 52 (1) does not assist my point, but the sentence which follows [9] has obviously suffered some distortion and as it stands the paragraph is pointless. In the circumstances, it is unfortunate that Profesor Potter did not prefer to give us his ' more cogent reasons ' for rejecting my view.

Finally, Professor Potter discusses my comments on section 107, the section which relates to contracts, and which in its second part (not distinguished by the learned author) lays down that equitable interests arising from the enforceability of contracts shall be minor interests capable of protection by notice. On this point, the differences between us go to the root of the relevant general principles of law and equity, and all that can be done here is to emphasise what, in my submission, those principles are. In the first place, a contract differs fundamentally from a grant. To suggest, as Professor Potter suggests, that ' the power to make an agreement for a lease must be included in the power to grant a lease conferred by section 18 ' is to ignore this distinction, and to disregard cases such as *Coatsworth* v. *Johnson*, where the court refused to extend to an agreement a section referring to leases, besides leading to the unacceptable conclusion that agreements for leases (or, indeed, contracts for sale) must be by registered disposition in accordance with section 19. Again, a contract creates a right *in personam*; it does not create an interest in land. To talk of a contract being ' enforced as a minor interest ' is a dangerous short cut, likely to confuse it with a grant. Any equitable interest which may arise in connection with a contract is the product of the equitable doctrine of specific performance. This difference has clearly been recognised by the draftsman. Previous sections have dealt with minor (and other) interests arising from express grant. Section 107, in its second half, now ' completes the system of protection ', as I put it, by dealing with minor interests arising in another way. Again, there is nothing in the Act which vests an interest, either legal or equitable, in the transferee under an unregistered disposition. The position is identical with that of a ' transferee ' under a deed of grant which has been signed but not delivered. In both cases, if the transferee be a volunteer, he has no equity to compel the grantor to complete the gift by registration or delivery. If, however, he is a purchaser for value, equity will no doubt treat the unregistered transfer as a contract to effect a registered disposition, by analogy to the well-known principles relating to void leases. If this implied

[9] ' Section 52 (1) confers protection for an interest which is not overridden by the general law, such as an interest under a strict settlement ': *ibid.*, p. 209. This reads as though an interest under a settlement cannot be overridden independently of the Land Registration Act, although in the next sentence reference is made to the overreaching provisions of the Settled Land Act.

contract is such that specific performance will lie, then an equitable interest will arise; but once again the interest arises from the enforceability of the implied contract, and once again its nature and protection are within section 107.

Professor Potter still insists that because by section 3 the word 'lease' is to include 'agreement for lease' then both a lease and an agreement for a lease for twenty-one years or less are overriding interests under section 70, with the result that such an agreement is binding on subsequent purchasers even though they have no notice and though it be not entered on the register. Now the word 'lease' is ambiguous; it may refer either to the transaction or to the interest thereby created. 'Agreement for a lease' on the other hand can only relate to the transaction; it cannot possibly refer to an interest in land, nor can it 'be' an overriding, or any other, interest in land. But section 70 relates to interests. The context thus necessarily excludes the interpretation given in section 3. This is in itself sufficient to solve the present problem, but as, in my review, I was concerned only with section 107, I contented myself with another approach—that the ambiguity of the earlier section must necessarily be controlled by the express words of the later section. Professor Potter contents himself with repeating his view and does not notice this argument.

The whole controversy is an excellent illustration of the importance in statutory interpretation of the interpreter's personal predilections—bias—prejudice—call it what you will. Both Professor Potter and I accept without question the importance of procedure in the moulding of substantive law. But whereas Professor Potter takes it for granted that real property law is the handmaiden of conveyancing, my own bias leads me to assume that conveyancing is the handmaiden of land law. This fundamental difference in outlook produces an inevitable chain of minor differences, all eventually colouring the detailed interpretation of individual sections. He assumes that the Land Registration Act is a code; I treat it as an appendix: he looks to the Act to provide its own classifications; I take it for granted that the Act accepts the traditional classification of ordinary land law. And so we each arrive at different interpretations of section 2 (1) and of other sections. The basic difference between us, like similar fundamental differences in religion and politics, is essentially emotional rather than intellectual in origin, and for that reason it is impossible to prove that one of us is right and the other wrong. All that can be done is to follow the example of propagandists of all colours, and make the strictly irrelevant claim that one view produces greater consistency and fewer difficulties than the other. On the present issues I am quite prepared to be judged by that test.

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REPORTS OF COMMITTEES

INTERIM REPORT OF THE COMMITTEE ON SUPREME COURT PRACTICE AND PROCEDURE (Cmd. 7764)

THE Evershed Committee have been at work on their Herculean labour for over two years and have, as they say, been reluctant to present an Interim Report feeling that the difficult question of the cost of litigation must be approached and judged as a whole. The recent report of the corresponding Committee on County Court Procedure (reviewed above at p. 354) has, however, encouraged them to present a very valuable Report dealing with two of the most vital aspects of their subject—extension of county court jurisdiction, and fixed dates for trial. It is here only possible to draw attention to the main outlines of their proposals, but the whole Report well repays study in detail and throws a fascinating light on various aspects of our legal organisation. For example, an Appendix gives statistics which show that although the population has almost doubled itself since 1871, the number of judges of the King's Bench Division has merely increased from eighteen to twenty while the number of county court judges has remained constant at sixty. It is also interesting to note that evidence was given to the Committee by the Bar Council, Law Society *and* by the newly-formed Standing Joint Committee of these two bodies and that the Joint Committee sometimes disagreed with its parent bodies (see paras. 121, 127 and 128). Judging from such information as has leaked into the Press the evidence tendered by these and other organisations should be of absorbing interest and it is to be hoped that in due course it will be published in full.

1. On the question whether costs of litigation could and should be saved by increasing the jurisdiction of county courts, the Report points out that county court scales are much lower than those allowed in the High Court and are on a party and party basis only. Prima facie therefore the more the county court jurisdiction is increased the greater the saving in costs. This, however, has not been the result in practice because of the reluctance of litigants and their advisers to have their cases tried in the county court. This reluctance the Committee attribute mainly to three factors: (1) the fact that litigants like to have their cases tried by a High Court Judge especially as there is no appeal from a county court's findings of fact; (2) the more expeditious recovery of judgment in default of appearance or defence or under O. XIV, and the more expeditious arrangements for execution; and (3) especially, the inadequacy of county court scales of costs which induces solicitors

to dissuade their clients from proceeding in such courts. Hence litigants will only go to county courts if some sanction compels them to do so.

Briefly, the Committee recommend that the pecuniary limit of county court jurisdiction in contract and tort should be increased to £300. Statistics showed that the increased number of cases proceeding to judgment after trial would be small and could be absorbed without difficulty and without interfering with the county courts primary function as courts for poor litigants. To compel litigants to resort to the county court the Committee recommend that if in a High Court action the plaintiff recovers less than £300 in a claim founded on contract or £200 in one founded on tort he should only be entitled to costs on the county court scale unless the judge otherwise orders. Where the judgment is recovered in default or under O. XIV, these limits should be reduced to £75, but even in these cases no costs at all should be awarded if less than £40 is recovered. The power of the High Court to remit cases to the county court should be extended and the defendant should no longer have a right, where the amount claimed exceeds £100, to have a county court action transferred to the High Court. The effect of these proposals on the reduction of costs is somewhat diminished by the fact that the Committee recognise that solicitors' disinclination to handle cases in the county court is not without justification and they recommend that scales of costs should be increased so as to be properly remunerative for the work. This is certainly a long overdue reform, and, as the Report states, even when it is carried out the costs of proceeding in the county court should still be substantially less than the corresponding High Court costs.

The Committee do not make any radical proposals for extending jurisdiction in other cases; for example, they oppose the grant of jurisdiction in actions of defamation or claims for declarations or injunctions unaccompanied by money claims or any increase in the equity jurisdiction. On the other hand they recommend increases of the Admiralty and contentious probate jurisdictions to a limit of £1,000 and the substitution of a rateable value of £60 for the present limit of rent or value in the case of actions for the recovery of land.

2. The greater part of the Report is taken up with a consideration of fixed dates for trial. The Committee give an interesting historical review of the many attempts to introduce this eminently desirable reform culminating with their recent experiment with witness actions in the Chancery Division (see Vol. 11 of this Review, at p. 470). They state that there is a widespread demand for dates to be fixed and that the Joint Committee of the Bar Council and Law Society consider that ' no single step would be likely to achieve greater results in reducing the cost of litigation '. Only one or two witnesses were opposed to it; the Report does not state from what section of the profession these dissentients were drawn, but it is

possible to hazard a guess. They also state that so far as they have been able to ascertain, England is the only civilised country in the world where litigants are not told, as a matter of course, the date on which their actions will be heard. It is indeed almost incredible that we have made such heavy weather of this matter; even the recent Chancery experiment met with criticisms which have caused the original scheme to be modified so that the fixing of dates has been removed from the Master in Charge and taken over by the judges themselves. The Report makes it pretty clear that the Committee are not entirely happy about this change; at any rate they conclude that no good reason has been shown from experience for saying that a system of fixed dates for both Chancery and King's Bench Divisions in London is impracticable and that it is too early to assert what will ultimately prove to be the best scheme for adoption in either Division.

In the past the failure to introduce or to persevere with arrangements for fixed dates seems to have been largely due to a reluctance to recognise that some inevitable loss of judicial time is not too great a price to pay for the advantages reaped by litigants, their advisers and witnesses. The Committee, however, fully recognise this. At the same time they point out that the loss of judicial time entailed by the Chancery experiment has been much less than might have been expected (only an additional 4½ hours in Michaelmas term 1948), and they contrast with this the 'very considerable' financial loss suffered by the community owing to dates not being fixed. Loss of judicial time in the King's Bench Division is likely to be greater owing to the absence of a suitable 'cushion' similar to the large number of non-witness Chancery actions, but this, quite rightly, they are prepared to accept. They also conclude that it is essential, if dates are to be fixed, that these should only be altered in the most exceptional circumstances and in particular that they should not be altered so as to meet the convenience of counsel concerned. Finally, they point out that in any system of fixed dates there is a choice, in the event of the case not finishing on time and another judge not being available, between finishing the first case (the principle adopted in the Chancery Division), and breaking it off so as to start the second (which is what normally occurs in county courts). The Committee are strongly in favour of the first principle.

The Committee reject various suggested compromises and despite the undoubted difficulties of a fixed date system (especially that of estimating accurately the length of trials and of knowing how many judges will be available in London) they recommend that such a system should be introduced forthwith in both the jury and non-jury lists in the King's Bench Division in London. Their proposed scheme of operation cannot here be dealt with in detail, but it is based on the original Chancery scheme and is to be operated by a Master (the Master of the Crown Office is suggested) who is to fix

a date on the application of either party and solicitors appearing before him should know the dates which would be convenient to all persons concerned, including witnesses and counsel. If neither party applies the case should be placed in a Warned List and be liable to be brought into the day's list wherever there is a judge without work. Although most of such cases are not likely to prove effective the few that are will act as a 'cushion' in the event of a sudden breakdown in the cases fixed. Such a system will have repercussions on arrangements in other courts (the C. A., C. C. A., H. L., J. C., etc.) and various recommendations are made to deal with these.

As regards Assizes, however, the Committee feel unable to recommend the immediate institution of a fixed date system. They consider that this would be impossible at one-judge Assize towns and impracticable at two-judge towns even if these were grouped or civil and criminal business separated. In their opinion the absence of any possible 'cushion' is an almost insuperable difficulty although they recommend that the matter be reconsidered when a year's experience has been gained in the fixing of dates in London. It is in this respect that we find the Committee's Report least acceptable. If a system of fixed dates can be satisfactorily operated in every other civilised country we refuse to believe that it cannot also be made universal in England, and if in fact the peculiarities of English procedure make it impracticable then we respectfully submit that it is the job of the Evershed Committee to reform our procedure. In view of the immeasurable advantages of fixed dates it is inconceivable that any necessary sacrifice of other advantages which our system may have over that, say, of Scotland or France would not be worth while—and on the score of expense there are no advantages to sacrifice. Moreover, the experience of our own county courts suggests that fixed dates need not be impossible even in one-judge towns. It is true that the county court system is not perfect since it sometimes involves adjourning a part-heard case, but it is for consideration whether an occasional postponement is too great a price to pay. The Committee seem to think it is, but in our view occasional hardship to a few would be better than the present general hardship to all. The introduction of a satisfactory system at Assizes would obviously be likely to require an increase in judicial strength; but why not? As mentioned above there has been hardly any increase during the last seventy years when the population has doubled. The Committee consider that their recommendations regarding fixed dates in London will need an increase of four judges only. Even if this increase had to be doubled or trebled it can hardly be argued that this would be an unjustified extravagance or that suitable appointments could not be made without a lowering of standards. As a *Times* leader said (September 5): 'To have too few judges at any point in the purveying of justice is the falsest of economy'.

Nor, it seems, would this increase seriously add to the accommodation difficulties to which the Committee also draw attention. These seem to be more acute in London, where the immediate provision of extra courts is urged, than on Assize and ex hypothesi the additional judicial strength would be used on Assize.

The Committee's proposal for an increase of four King's Bench judges is dependent on certain other proposals for reorganising business. The Report gives statistics to show that in 1947 the average number of days spent in sittings and in travelling on circuit by each King's Bench judge was only 166. Moreover, the working day in London was only about 4½ hours although often very much longer on circuit where it frequently happens that judges sit until 6 or 7 p.m. and on Saturdays. The Committee recommend that the overloading of lists at Assizes, and late and Saturday sittings should be discontinued and think that if this were done it would be reasonable to expect judges to sit longer notwithstanding their other public activities. They therefore recommend that the Long Vacation should be reduced from ten weeks to eight (August and September), that the Christmas Vacation should be reduced by one week and that there should be a full 5-hour working day. It is generally recognised in the profession that these recommendations, particularly as regards the Long Vacation, represent a long-overdue reform; as the Committee say, 'We have taken evidence from a considerable number of witnesses on this subject, including a number of business men who consider the present vacations inordinately long, especially when compared with those enjoyed by people in other professions, and we believe that our recommendations would have wide approval'. 'Business men' must not of course assume that the vacations represent a complete period of rest for the legal profession; on the contrary some months' freedom from court sittings is essential if legal business is to be satisfactorily transacted. At the same time it is impossible to defend a system under which arrears accumulate and litigants are left in uncertainty as to when their case will be heard while the courts sit on less than half the days in the year and then for only 4½ hours. This applies particularly to the Chancery Division (with an average of only 165 days) which has not even the excuse that it works harder on circuit, and it is noticeable that the Committee do not recommend any increase in the number of Chancery judges as a result of the introduction of the fixed date system in that Division.

It is therefore to be hoped that the Committee's recommendations will be implemented without delay. The increase of county court jurisdiction will involve legislation but the fixing of dates can be effected forthwith and it is good to note that the Lord Chief Justice has agreed to make the experiment, although apprehensive of the administrative difficulties, provided that the Committee's

recommendations in regard to increased judicial strength, accommodation and staff are also implemented. It would be a tragedy if cheese-paring financial objections to the latter were allowed to hold up the introduction of this vital reform but in the light of the Committee's Report this seems unthinkable. The Committee refer in passing to a number of the other matters that are receiving attention such as the reorganisation of the circuit system and the High Court Divisions, and appeals. Their subsequent Reports on these and other proposals for reducing costs will be eagerly awaited; for upon them may well depend the future prosperity and independence of the legal profession.

L. C. B. Gower.

TWO REPORTS ON SEX OFFENCES

1. Psycho-Therapeutic Treatment of Certain Offenders with special reference to the case of persons convicted of sexual and unnatural offences. Scottish Home Department. Report by the Scottish Advisory Council on the Treatment and Rehabilitation of Offenders. (Edinburgh: H.M.S.O., 1948, price 4d.)

2. The Criminal Law and Sexual Offenders. A Report of the Joint Committee on Psychiatry and the Law appointed by the British Medical Association and the Magistrates' Association. (Published by the British Medical Association, 1949, price 3d.)

It is symptomatic of the serious attention now being given in this country to the position of the sex offender that, within a comparatively short period of time, these two Reports should have been published, both of them dealing, in part at least, with the same aspects of the subject.

The Scottish Report, which was submitted by the Scottish Advisory Council to the Secretary of State for Scotland and may, therefore, be regarded as official or at least semi-official, is narrower in its scope, being mainly concerned with the prospects of psycho-therapeutic treatment and how it should be incorporated in the existing framework of criminal procedure. The English Report which, though unofficial, has behind its recommendations the unanimous approval of the Councils of both the British Medical Association and the Magistrates' Association, deals in addition with the whole question of how to adapt the present substantive law of sex offences and, in particular, the law of criminal procedure to the special needs of the sex offender and of his victim.

I. *Statistics.* In both Reports some statistical figures are presented which show a considerable increase for most types of sex offences over the past five or ten years respectively, *e.g.*, for rape from 99 in 1938 to 240 in 1947, for attempted unnatural offences from 822 to 1,839, for indecent assault on females from 2,593 to 5,052 (England and Wales, crimes known to police). It is, however,

not only this increase in the numbers of offences or convictions that causes concern. Whereas in the Scottish Report it is mentioned without further comment that of the 2,597 persons charged during the years 1941 to 1946, only 2,066 were found guilty, special attention is drawn by the English Committee to the high percentage of persons charged but not found guilty (*e.g.*, seventy-six out of 297 charged with indecent assault, thirty-three out of ninety-three in the case of rape, fifty-four out of 259 in the case of indecency with males), and the Committee find it ' difficult to believe that in all these cases the defendants were innocent. With improved methods of trial there would probably be more findings of guilt '. It is emphasised that unjustifiable acquittals are a danger not only to the community at large and the victim but also to the offender himself who is thereby given another opportunity of continuing his misconduct until it may be too late for constructive treatment. To this, one of the main arguments in favour of reforming criminal procedure, we shall revert later on.

II. *Substantive criminal law.* In the English Report, an attempt is made to tackle, at least briefly, the thorny question of modernising the law of sex offences, in particular of homosexual activities. It may be regretted, however, that in spite of many admirable observations, the Committee did not feel able to recommend at once the abolition of punishment for homosexual conduct between responsible adults, practised with the full consent of both parties. Instead, an early official inquiry is suggested into the advisability of the English law being brought into line with Continental law. On this, one might perhaps comment that, if this recommendation should be adopted by the Government, the proposed legal inquiry should be combined with a fact-finding investigation into the whole problem of homosexuality, its extent, character, and social and psychological aspects. The principal argument which prevented the Committee from recommending an immediate change in the law seems to have been Sir Norwood East's view that the existing threat of punishment may have a deterrent effect in some cases. Clearly, this contention would have to be one of the points for investigation by such a fact-finding body, the setting up of which was, by the way, already suggested by Dr. E. A. Bennett and the present writer at a meeting of the Section of Psychiatry at the Royal Society of Medicine on April 8, 1947.[1]

Other recommendations regarding changes in the substantive criminal law, all of which can be unreservedly endorsed, include the re-drafting of the wording of certain sexual offences and the removal, no doubt long overdue, of the offence of exhibitionism from the Vagrancy Act, 1824, where it is lumped together with fortune-telling, wandering abroad, begging and exposing wounds, and similar relics from the Napoleonic Wars.

[1] See *The Medical Press*, September 3, 1947, pp. 208 and 212.

III. *Criminal procedure.* Here, the recommendations of the English Report are more comprehensive and radical, though on the whole not more original than in the field of the substantive law. Quite unmistakably, most of them bear the mark of Mr. Claud Mullins, who was one of the members of the Committee and in whose excellent book *Crime and Psychology* they are discussed more forcefully and at greater length. They may be summarised under the following headings:—

(1) For all charges of sexual offences against children, the replacement of trial by jury by a court specially constituted at assizes or quarter sessions, consisting of a legal chairman of high qualifications assisted by two magistrates experienced in juvenile court work. This would do away with all the harmful and at the same time unnecessary solemnity and rigidity and all the delay inseparably connected with trial by jury. It is also likely to reduce the percentage of wrong acquittals and the mental and emotional strain on child witnesses.

(2) Power for magistrates' courts to pass longer sentences for exhibitionism than the present maximum of three months which is much too short for any attempt at psychological treatment, provided such extended term could be served in the special institution referred to below (IV). Longer terms of ordinary imprisonment are held to be undesirable for such offences.

(3) An expert inquiry by lawyers and psychiatrists into the question whether persons suspected of sexual offences should, if they wish to do so, be permitted to make a statement to the police without being interrupted by a caution as prescribed in the Judges' Rules of 1912. Although it is admitted in the Report that these Rules contain many features essential to a fair administration of justice, some of them are apparently regarded as going too far in the protection of suspected persons—a view which is, by the way, shared by other recent writers.[2]

(4) Altogether, and this introduces perhaps the most comprehensive programme of reform conceivable in this field, the Report insists that 'the present system of trial in sexual cases needs to be examined from the psychological point of view'. In a way, even this is by no means revolutionary as the intimate relation between criminal procedure and psychology requires no further explanation. Is it not true to say that the rules of evidence, in particular, are, or should be, nothing but applied psychology? How far criminal procedure has actually moved away from simple every day psychology is shown, however, by the many examples given in the Report, most of them again already discussed in Claud Mullins' book, whether they refer to a simpler form of oath for children or to the way in which child witnesses should be treated by the court, or adult female witnesses by cross-examining lawyers, or to the tightening up of sections 37 and 39 of the Children and Young

[2] See Mr. A. C. L. Morrison in *Journal of Criminal Science*, Vol. 1.

Persons Act, 1933. More important even than these technical points are the questions, only too superficially treated in the Report, of the psychological reliability of juveniles as witnesses and of the need for corroboration of their unsworn evidence. These are indeed very big issues of forensic psychology, and they might to some extent be behind the high percentage of acquittals criticised by the Committee. It is, in other words, very likely not only the clumsiness and general unsuitability of trial by jury, it is not only the excessive protection afforded to the suspected person under the Judges' Rules, but also the delicate character of most criminal charges of a sexual nature that makes it so particularly difficult here to establish the truth. The change in the law (section 38, Children and Young Persons Act, 1933), which is suggested, to the effect that unsworn evidence may be accepted if corroborated by other unsworn evidence, though no doubt desirable, can hardly be expected to solve these intricate problems. The Committee might well have stressed more strongly the need for the utmost reserve and skill in the examination of children not only at the trial but especially in the preceding stages, and the case for better training of all those who have to do it. The technical difficulties arising from the limited scope given in English criminal procedure to evidence of similar facts and of bad character [3] might have also been alluded to in the Report to explain the high rate of acquittals.

(5) For the stage after the finding of guilt two recommendations of great practical importance, made many times in recent years, are now taken up by the Committee; first, that courts should at this stage be obliged to seek the advice of a duly qualified medical practitioner (also endorsed by the Scottish Report), and, secondly, that, to avoid the danger of partisan evidence, the court, instead of having to rely on their selection by the parties, should be given power to call such experts. In view of the inadequate supply of competent experts, the establishment of travelling clinics for diagnostic work is envisaged.

IV. *Sentencing policy.* To many readers, the paragraphs dealing with matters of sentencing and treatment will be more interesting than mere questions of procedure, and it is to these matters that special attention is paid in the Scottish Report. There are, however, a number of recommendations that are common to both Reports; in particular, fewer short prison sentences and more probation with condition of psychological treatment. In Scotland, of the 2,066 persons found guilty during the five year period surveyed only 7 per cent. were put on probation, and there was no indication that in any of these cases a condition of treatment had been included. In England, slightly more use is made of probation, but, although the number of short prison sentences for indecent exposure has slightly declined in recent years, there were still 316

[3] See H. A. Hammelmann, M.L.R. January, 1949, p. 1.

such cases in 1947, just as many as probation orders. Fining is very popular, 1,047 cases in England in 1947 for this offence, but the Report stresses that fines should not be imposed on sexual offenders unless they deny guilt or do not co-operate in treatment.

Of considerable interest is the treatment programme submitted by the Scottish Report, where it is suggested that sex offenders should be divided into three categories:—

(a) Cases of a comparatively minor nature where the offence may be regarded as a mere episode in adolescence and treated in accordance with the principle 'Least said, soonest mended'. For them, it is suggested that, if the offender and his parents are co-operative and such a course is advised by a medical expert, the prosecutor may withhold court proceedings on condition of attendance for treatment. Where court proceedings are considered indispensable, a probation order should be made.

(b) Cases which do not fall under category (a) but are not unlikely to respond to long-term treatment. Here, a prosecution is regarded as useful in making the offender willing to co-operate in treatment, and for the same reason a prison sentence with its discipline, it is believed, may have some value. The choice will therefore be between a probation order with condition of treatment and a prison sentence sufficiently long to enable the course of treatment to be completed before discharge. Such sentences, however, and here both Reports are in full agreement, should be served not under ordinary prison conditions but in the special institution recommended ten years ago in the East-Hubert Report on 'The psychological Treatment of Crime', or, as long as no such institution exists, at least in the psycho-therapeutic centre of an ordinary prison (such as Wormwood Scrubs or Wakefield in England). To judge from the annual Report of the Prison Commission for 1947 (p. 64), the outlook for an early realisation of the East-Hubert project is not too bright. In the English Report, in addition to such a special institution within the penal system similar institutional facilities outside, for example in hospitals, are called for.

(c) There remains the case of the incorrigible sex offender. For him, in the Scottish Report two alternatives are envisaged: First, the traditional long prison term, taking perhaps the form of a sentence of preventive detention. This is regarded as justifiable only if the conditions of detention were less punitive than in the ordinary prison of today, with more outside contacts, more satisfactory and creative employment and psycho-therapeutic treatment, if not for the purpose of cure at least for that of partial relief. The other alternative suggested, which would of course require special legislation, is detention in a State mental hospital on the evidence of two qualified medical experts, with re-examination at fixed intervals.

It is to be regretted that no mention is made in either Report of the various attempts made, especially in Denmark and some States

of U.S.A. (Illinois, Minnesota), to deal with the problem of the psychopathic sex offender. Whether or not one approves of the details of these experiments, their careful examination can only help to clarify our own minds.

HERMANN MANNHEIM.

Postscript. As the present reviewer has now become a member of the Joint Committee on Psychiatry and the Law of the British Medical Association and the Magistrates' Association, it should be made clear that this Note was written and submitted to the Editors of the *Modern Law Review* before he had received the invitation to join the Committee.

H. M.

NOTES OF CASES

IMMUNITY OF FOREIGN SOVEREIGNS

THE decision of the Court of Appeal in *Krajina* v. *The Tass Agency* [1949] 2 All E.R. 274, does not establish any new principle of law, but turns on its facts. If it invites a few words of comment, this is on account of what it does not decide rather than what it does decide.

The plaintiff claimed damages for libel contained in *The Soviet Monitor* which, presumably through their London office, the defendants published in England. The defendants claimed to be entitled to immunity from jurisdiction. The Tass Agency, described in an uncontradicted certificate issued by the Soviet Ambassador as a department of the Soviet State, was formed by a statute according to clause 1 of which it 'is the central information organ of the U.S.S.R. and is attached to the Soviet of People's Commissars of the U.S.S.R.' According to another clause of the same statute it shall 'enjoy all the rights of a juridical person'. In the absence of any other material evidence, particularly of legal evidence, the Court of Appeal found it impossible to infer from the latter clause that the Agency was in fact a corporation having the status of a legal entity separate and distinct from the Soviet State. This conclusion would seem to have been inevitable. As Cohen and Tucker L.JJ. showed by referring to a number of similar instances in English law, there is nothing unusual in the suggestion that a government department may enjoy the rights of, yet does not constitute a legal entity. There was indeed a lack of realism in the emphasis which the plaintiff's argument put upon the existence or non-existence of corporate status, and there is force in Cohen L.J.'s dictum (p. 280), concurred in by Tucker L.J. (p. 284), that even if the existence of a separate legal entity had been proved, it would not necessarily have followed that it would not have been entitled to immunity:

> The history of the legislation in this country as regards the departments of State seems to me to show that it is quite possible that a State may for certain purposes under its own legislation give some department of State the status and the rights of a juridical entity without depriving the department of its general immunity from suit.

The underlying idea would appear to be that what really matters is not the status, but the functional character of the enterprise: even if a corporation has been created, the fact that it performs governmental functions may entitle it to immunity.

Would it then not be appropriate to hold conversely that where an enterprise does not perform governmental functions, it is not

entitled to immunity, even if it is a government department without separate corporate status? Suggestions on these lines have frequently been made. As Singleton L.J. pointed out in the present case, under modern conditions they require serious consideration, notwithstanding the difficulty of drawing the line between governmental and trading functions or of propounding another formula which, as far as possible, avoids political evaluations, yet embraces all the activities of the modern State, irrespective of whether they are carried on by (incorporated or unincorporated) government departments or by government-controlled companies. The realities of the present situation clearly necessitate the elimination of artificial and frequently fortuitous distinctions and a complete overhaul of this branch of the law. There is both here and abroad a strong current of opinion that the trading State should not be entitled to immunity. It is to be hoped that the House of Lords will soon be given the opportunity of deciding this important point and that on that occasion the argument will proceed on that broad comparative basis which the character of the problem requires and justifies.

In the Court of Appeal the plaintiff admitted that in view of *The Porto Alexandre* (1920) P. 30 and of *Compania Mercantil Argentina* v. *United States Shipping Board* (1924) 40 T.L.R. 601 it was not open to him to argue that by the nature of their activities the defendants were deprived of immunity. These two cases, however, were distinguishable on the ground that there no trading had occurred in this country. Indeed, there would not seem to be any case in which it was held that a foreign sovereign State, when trading here, is entitled to immunity in respect of a liability arising out of such trading; as to an ambassador and a head of State, see, however, *Taylor* v. *Best* (1854) 14 C.B. 487, 519 and *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149. The Draft Convention on Competence of Courts in regard to Foreign States (*Supplement to American Journal of International Law*, 1932, p. 455), for which eminent experts are responsible, suggests (Art. 11) that a State may be sued

> in the courts of another state when, *in the territory of such other state*, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage or does an act there in connection with such an enterprise wherever conducted and the proceeding is passed upon the conduct of such enterprise or upon such act.

In the comments to Art. 11 a great deal of supporting material will be found. It is perhaps of particular interest to refer to the decision of the French Cour de Cassation in the case of *Société Gostorg* c. *L'Association France-Export*, February 19, 1929, Clunet 1929, 1042; A.D. 1929–30, No. 7 which arose out of a contract made by the Russian Trade Delegation in France. The court held

> que l'arrêt constate que cette représentation commerciale

> manifeste son activité commerciale dans tous les domaines; que ces manifestations ne peuvent apparaître que comme des actes de commerce auxquels le principe de la souveraineté des Etats demeure complètement étranger.

On the basis of similar facts it was also held that the Russian Trade Delegation was liable to enter its name on the Commercial Register: Trib. Comm. Seine, January 13, 1927, Gaz. Pal. 1927–1–359; A.D. 1927–28, p. 30.

In the instant case, at the date of the issue of the writ, the Register of Business Names, set up under the Registration of Business Names Act, 1916, contained an entry according to which one Frederick Taylor carried on business in Fleet Street under the name of Tass Agency as agent for the foreign firm Tass Agency, Moscow. Assuming, as the court was prepared to do, that Mr. Taylor was the defendants' agent, could it not have been argued that a foreign state department which not only carries on business in this country by publishing a paper and otherwise, but also descends to the commercial arena by having its business registered under the Act of 1916, is not entitled to immunity? It may well be a rule of law that a state may not perform activities in the territory of another state without the latter's consent; see Oppenheim (–Lauterpacht), 7th ed., I, 262, although he appears to limit the rule to acts of sovereignty. If the U.S.S.R. did not obtain the Crown's consent to the Tass Agency's activities here, but preferred to put it on the same level as any other 'foreign firm', it does not seem unreasonable to suggest that it must be treated like such a firm. Any other result would mean that a foreign State could both eat its cake and have it: it could without the Crown's consent carry on its activities here on the same basis as a foreign trader, yet it could invoke that respect which the Crown pays to the independence of foreign States by withholding its courts' jurisdiction over them.

F. A. Mann.

PUBLIC CORPORATIONS AS CROWN SERVANTS

In the past the courts have given many and various reasons for their answers to the question: Who is a Crown servant? The discussion has centred around such phrases as public purposes, governmental purposes, emanation of the Crown, amount of discretion and degree of control. The most recent tendency (at least until the case under discussion) has been to follow the private law analogy. It is not to be expected that the answer to the question should be the same in the middle of the nineteenth as in the middle of the twentieth century and judicial attempts at formal rationalisation of previous decisions have, naturally, not been particularly successful.

The plaintiff in *Tamlin* v. *Hannaford* [1949] 2 All E.R. 327 was lessee of a house formerly owned by the G.W.R. and now vested, under the Transport Act, 1947, in the Transport Commission. The defendant was sub-tenant of some rooms in the house which constituted a separate dwelling within the meaning of the Rent Restriction Acts. The plaintiff sued for possession and the county court judge held that the house must be regarded as owned by the Crown and administered by the Commission as its agent and that since the Crown is not bound by the Acts, an order for possession must be made. The appeal of the defendant was based on two grounds: first, that the Commission was not an agent or servant of the Crown and secondly, that, if it were, the plaintiff, not being such a servant or agent, could not avail himself of the rule relating to the Crown. The Court of Appeal, whose judgment was delivered by Denning L.J., allowed the appeal on the first ground and expressed no decision on the second, which was not argued.

The court found the main point of distinction between the Commission and an ordinary corporation to lie in the fact that the former has no shareholders and raises its money by borrowing, which is guaranteed by the Treasury. It observed that the taxpayer as 'the universal guarantor of the corporation . . . is clearly entitled to have his interest protected against extravagance or mismanagement'. So also were users and beneficiaries—'in short, everyone in the land'. The protection of these interests had been entrusted by Parliament to the Minister of Transport (whose powers were as great as those possessed by a man who holds all the shares in a private company) and he was subject to a duty to account to Parliament for his stewardship. The court then listed his 'great powers' of appointment of 'directors' whose remuneration he also fixed, of requiring information, of giving directions of a general nature in matters which appeared to him to affect the national interest 'as to which he is the sole judge' and which 'they are then bound to obey'. The court at this point and without more ado stated: 'But still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders or even of a sole shareholder . . . It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government'. In support of this conclusion, the court pointed to the way in which the railways had been dealt with, how the Commission was subject to the same rights and liabilities as were the former companies, including statutory and even some customary duties; moreover, execution could be levied against the property of the Commission which was not possible against a government department.

Finally, the court stated that the control exercised by the Minister of Transport over the Commission was not sufficient to

make the Commission a servant or agent of the Crown (*Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co.* [1919] A.C. 744 was referred to) and that when Parliament intended that a new corporation should act on behalf of the Crown, it, as a rule, said so expressly as in the case of the Central Land Board. In the absence of an express provision, the proper inference for a commercial corporation was that it acted on its own behalf 'even though it is controlled by a government department'.

It is to be regretted that the Court of Appeal did not go more fully into the reasons for its decision. Much of the judgment seemed to indicate a contrary conclusion, but the reasons stated which can be extracted were these. First, that the Commission was not exempted from the obligations which bound the railway companies which it superseded; secondly, that execution was leviable against the Commission; thirdly, that the Commission was not expressly stated to be acting on behalf of the Crown; fourthly, that it was not a government department nor did its powers fall within the province of government; fifthly, that the Minister of Transport, despite his powers and despite the fact that he had to account to Parliament for his stewardship, did not exercise sufficient control over the Commission. It seems to us, with respect, that the first three of these reasons are not conclusive one way or the other; that the fourth is, as to its first part, irrelevant and, as to its second part, open to serious question; and that the fifth, being the crux of the whole matter, would have merited detailed examination, and is not adequately proved by the only case quoted in its support.

J. A. G. Griffith.

Enforceability of Affirmative Covenants Concerning Land

Is a public authority liable, under an affirmative covenant concerning land, to an assignee of the *covenantee*, if there is no land owned by the authority which can be regarded as a 'quasi-servient tenement?'. In *Smith* v. *River Douglas Catchment Board* [1949] 2 All E.R. 179 the Court of Appeal re-asserted the old rule in the *Prior's Case* of 1369 (see 1 Sm. L. C. (13th ed.) 73, Holdsworth, *Hist. Intro. to the Land Law* 246) and held that it is. Historically affirmative covenants originated in express covenants for title and were analogous to the law of warranty of title of land. If X sold land to Y and Y to Z, Z could sue X on a covenant for title, although X may have owned no other land. This rule became part of the *Rule in Spencer's Case* (1583) 5 Rep. 18a but has seldom come before the courts. In the case of restrictive covenants it has been held that the *covenantee* must own land in order to enforce the covenant against the covenantor's assigns, so that a public authority which had no land vested in it could not enforce restrictive covenants against assigns (*L.C.C.* v. *Allen* [1914] 3 K.B. 642) except

under special statutes (*e.g.*, Housing Act, 1936, s. 148). A *covenantor* must have owned land at the time of the covenant or he would be incapable of binding it, unless empowered to do so by statute (*e.g.*, L.P.A., s. 101, sale by mortgagee). No question of enforcing an affirmative covenant *against* assigns can arise, but it is curious that the Court of Appeal in *L.C.C.* v. *Allen* (*supra*), do not seem to have adverted to the *Prior's Case* (although it had been cited in *Rogers* v. *Hosegood* [1900] Ch. 388) and did not think they were creating a different rule from that in *Spencer's Case*. Thus Buckley L.J. (at p. 660) referred to ' the doctrine in *Spencer's Case* in which ownership of land by *both covenantor and covenantee* is essential ' and Jessel M.R. in *L. S. W. Ry.* v. *Gomm* (1881) 20 Ch.D. 562, at p. 583) and Farwell J. in *Rogers* v. *Hosegood* [1900] Ch. 388, both assumed that the law of restrictive covenants was the same as the rule in *Spencer's Case* on this point. In modern times the law of restrictive covenants has been moving towards the law of easements. It is perhaps regrettable that the law of affirmative covenants lags behind it and does not insist on two ' tenements '.

The four main points of the decision in the *River Douglas Case* are not new, but are so well put that it will no doubt become a leading case. Tucker L.J. restated the rule applying to affirmative covenants, that they must be inherently capable of running with the land and that it must appear from the documents that they were also intended so to run. Law of Property Act, 1925, s. 78, raises a presumption in the latter case; it provides that covenants inherently capable of running with the land shall be deemed expressly made with successors in title of the covenantee, and, logically, this presumes that they are made for the benefit of such successors and are enforceable by them (this point is clearly made by Denning L.J. at p. 189). The third point is the point in the *Prior's Case* referred to above. The fourth point is not expressed in the judgments but is clear from the *ratio decidendi*. The Court of Appeal have re-asserted the rule that once the benefit of a covenant has been ' annexed ' to land it passes to the successors in title of the covenantee without express assignment. Morris J. at first instance ([1948] W.N. 414) considered that the express assignment of the benefit of the covenant had been ineffective, apparently because no notice had been given to the covenantor. In recent cases, like *Shayler* v. *Woolf* [1946] Ch. 320 (C.A.), there have been express assignments of the benefit, and there seems to have been some uneasiness on this point (see Elphinstone, *Covenants affecting Land* (1946), sec. 52).

Two other principles are emphasised in the judgment of Denning L.J. but neither was necessary for the decision and neither seems to have been supported by the other members of the court. In the first place Denning L.J. asked for a liberal and literal application of the Law of Property Act, 1925, s. 56, which, taken alone, would seem to allow any third person to enforce a contract

made for his benefit. Most lawyers will sympathise with the learned Lord Justice on this point. But it would be misleading to imagine that the section will so be interpreted. The courts have limited it very narrowly to the context of conveyancing, and to cases where third parties may already sue, apart from minor technicalities, and refused to hold that it 'has created such an enormous change in the law of contract' (*Re Foster* (1938) 159 L.T. 279 at p. 282, Crossman J.). Other cases where section 56 was treated very cautiously are *White* v. *Bijou Mansions* [1937] Ch. 610, 624; [1938] Ch. 351, at 365; *Re Sinclair* [1938] Ch. 799, and *Re Miller* [1947] Ch. 615. It was not cited in *Re Schebsman* [1944] Ch. 83. Finally Denning L.J. urged a return to the seventeenth century practice of allowing third parties to enforce contracts. As the learned Lord Justice points out, the problem is one of consideration. (The third party has provided no 'inducement' for the promise, either by providing a benefit or suffering a detriment.) Once the modern doctrine of consideration became fixed these older cases ceased to be authorities. If such cases are now antique the suggestion made by Denning L.J. that the *Prior's Case* (*supra*) be made the basis of a third-party right is archaic. The 1369 decision antedates by centuries the entire law of contract (since *assumpsit* at that time was just coming into existence and still savoured of the law of tort), and is closely involved in ancient rules of real property law. If reform is to come it seems, with respect, that direct legislation is called for, and that the recommendations of the Wright Committee should be implemented. This is not to say that all lawyers are not grateful to Denning L.J. for putting in sharp relief a matter which troubles the consciences of many lawyers and isolates English law from the law of most other countries.

A. K. R. Kiralfy.

NEGLIGENCE—THE GHOST OF EARL *v.* LUBBOCK

In the preface to *Salmond on Torts* (10th ed., vii) that great lawyer, the late Dr. W. T. S. Stallybrass, makes the following statement: 'I have reduced the lengthy discussions of old cases . . . which no longer have the same . . . authority as they had forty years ago, such as . . . *Earl* v. *Lubbock*'. Indeed, one would have thought that it was dead. (See *Clerk & Lindsell on Torts*, 10th ed., p. 643 n. (*b*), and *Winfield on Torts*, 4th ed., p. 543 n. (*n*).) It would appear, however, that it is not, or at least that it has a lively ghost.

On the facts, it is unlikely that anyone will be disposed to quarrel with the decision of the Court of Appeal in *Ball* v. *L. C. C.* [1949] 2 K.B. 159. Where, on a particularly cold morning in February, when the pipes are frozen, a young lady lights a boiler which has no safety-valve, she can hardly complain when she is injured by

the consequent explosion that those who omitted to supply the boiler with a safety-valve when they installed it, 'caused' the accident. All decisions on negligence ultimately turn upon the facts and the young lady's lack of care for her own safety was the salient feature of this case. On the facts, it is perhaps only interesting to note that when another young lady recently applied a lighted cigarette to some highly inflammable material, remarking that it would make a lovely bonfire, the 'cause' of the conflagration was held to be the negligence of those who had left the material in a place where young ladies might be tempted to do this sort of thing. (*Philco Radio & Television Corporation* v. *J. Spurling, Ltd.* (1949) 65 T.L.R. 388; [1949] 2 All E.R. 129).

Ball v. *L. C. C.* is, however, something more than a decision on the facts. The young lady concerned was the daughter of the tenant of the premises on which the explosion occurred and the defendants, who had installed the boiler gratuitously seven years before, were the landlords. These factors led the Court of Appeal to consider the effect of the decision in *Malone* v. *Laskey* [1907] 2 K.B. 141, an authority which, it seems, would in the opinion of the court, have bound it to decide for the defendants even apart from Miss Ball's carelessness.

The views expressed by the court upon this matter may fairly be summarised in the following way. In a case of this kind the landlord-tenant relationship gives the landlord no special immunity. He only enjoys such an immunity in cases where the famous dictum 'fraud apart, there is no law against letting a tumble-down house' (*Robbins* v. *Jones* (1863) 15 C.B.(N.S.) *per* Erle C.J. p. 221) opposes to an unwary tenant or purchaser the maxim 'caveat emptor' (*Cavalier* v. *Pope* [1906] A.C. 428; *Travers* v. *Gloucester Corporation* [1947] 1 K.B. 71). This plea cannot avail a landlord who for value or otherwise does work upon, or instals things upon, the premises subsequently to the letting. (As to the irrelevance of the relationship, see [1949] 2 K.B. 167, 176.) *Malone* v. *Laskey* is, however, an authority for the proposition that where anyone, whether a landlord or not, carries out some operation on premises of which he is not in occupation, he owes no 'duty of care' to anyone who may be upon or come upon the premises, other than a person with whom he is in a contractual relationship. It follows, therefore, that in *Ball's Case* in respect of the fixing of a boiler without a safety-valve, in *Malone* v. *Laskey* in respect of the fixing of an inadequate bracket for a cistern, the landlord may be as negligent as he likes towards all and sundry and will not be liable for injuries which they may suffer unless he owes them a contractual duty. To broaden this proposition (legitimately it is submitted since neither in *Ball's Case* nor in *Malone's Case* does any importance appear to have been attached to the fact that the service was gratuitous) one is brought to this: if I perform a contractual duty in such a way as to cause injury to the person

with whom I contract, I am liable to him for my negligence but I am not liable to third parties. See *per* Evershed L.J. [1949] 2 K.B. 176, where the learned Lord Justice even goes as far as to use the word 'privity', the lack of which appears to give rise to the immunity. This is the ghost of *Earl* v. *Lubbock* ([1905] 1 K.B. 253, with a vengeance! On this line of reasoning one might suppose that if I drive my car under contract upon the understanding that I am to drive the hirer carefully, I shall not be liable to pedestrians whom I injure by my carelessness.

To this peculiar rule of immunity it appears, however, from the combined effect of *Ball's Case* and *Malone's Case*, there are certain 'exceptions'. These exceptions seem first to have been classified by counsel (Lush K.C.) in *Malone's Case*, p. 148. The first exception is that there will be liability where what is done amounts to a public nuisance. The second, exemplified by *Langridge* v. *Levy* (1838) 4 M. & W. 337, renders those who make false representations which cause damage to third parties liable; it was indeed on the somewhat peculiar ground that in *Malone's Case* there was no representation that the judgments of Sir Gorell Barnes P. and Fletcher Moulton L.J. seem to have turned. The third exception seems to apply where anything dangerous 'per se' is installed on the premises. A large part of the dicta in *Ball's Case* are directed (and, it is respectfully submitted, on the expert evidence very rightly so) to demonstrating that a boiler without a safety-valve is not dangerous 'per se'.

Since the Court of Appeal is bound by its own previous decisions, there can be no fair criticism of the acceptance in *Ball's Case* of the rule in *Malone* v. *Laskey* as summarised above, beyond the expression of a doubt whether, in view of the decision of the House of Lords in *Donoghue* v. *Stevenson* [1932] A.C. 562, the House may not be taken impliedly to have disapproved it. What is surprising, however, is that the Court of Appeal should have accepted the authority of *Malone* v. *Laskey* without any apparent regret. The case has not escaped criticism (see *Clerk & Lindsell*, 10th ed., p. 661, the strictures of Hamilton J. in *Blacker* v. *Lake & Elliott* (1912) 106 L.T. 533 and *Cunard* v. *Antifyre* [1933] 1 K.B. 551). A fair reading of it leads one to the conclusion that it was decided against the plaintiff solely on the ground that she could not establish a recognised 'duty of care' and this, too, is the reason expressed for the dicta under discussion in *Ball's Case* (see *per* Tucker L.J. at pp. 173–4). But *why* is there no 'duty of care'? *Why* do I owe a duty to pedestrians to drive carefully, but none to the wives of sub-tenants to instal cisterns carefully? The answer seems to be: 'Because of *Malone* v. *Laskey*'. Why was *Malone* v. *Laskey* decided the way it was? 'Because the court decided that there was no duty.' This is as good an example of the circular argument which evades the issue as one can conceive. Admittedly 'lack of privity' and lack of 'misrepresentation' have been suggested as

reasons for the denial, but they do not sound very convincing to the modern ear, and in any case they are bare negations and not statements of any positive principle. The positive reasons for denying an action in cases of this class where negligence in fact is proved really fall to be conjectured, since the courts never face them. One possible reason may, it is suggested, be this. A landlord *in* occupation is not liable to 'licensees' unless he sets a 'trap', *therefore*, it is felt, a landlord out of occupation ought not to have a higher duty cast upon him. This is, of course, a *non sequitur*; in the 'occupier' cases a positive duty to act is imposed upon the defendant, in the cases under discussion the activity is undertaken either under contract or purely voluntarily and the liability sought to be imposed is for negligent performance, not for non-performance. (On this distinction which is, it is submitted, a very important one, see Professor F. H. Lawson in 22 Tulane L.R. 111).

At the risk of boring the reader (see note in 12 M.L.R. 236) it may, however, finally be suggested that the real reason for the denial of an action in this class of case lies in the unfortunate practice of imposing upon the *plaintiff* the onus of proving a 'duty'; this practice enables a court faced with an allegation of 'duty' to rely on previous authority which has refused to admit one, often for no better reason than that a still earlier authority has done the same—and so on, back to the roots of time, before the possibility of an action for negligence had ever been envisaged at all. If the textbooks were right and there *were* such a thing as an action for negligence the plaintiff would simply have to prove damage directly arising from the act or omission of the defendant, and the onus would then lie upon the defendant to bring his case within the ambit of a special 'immunity'. In order to succeed he would have to give reasons for his claim to be immune and the court, if it were to support him, would be forced, as at present it is not forced, to bring the reasons for its decision into the light of day.

PHILIP S. JAMES.

SERVANT—SECRET PROFIT

WHERE a servant makes a secret profit through the use of his master's money, property, name or in any other way out of his employment, the master is entitled to benefit by the illicit sum. *Re Reading's Petition of Right* [1949] 2 All E.R. 68 (C.A.), is an illustration of the application of this principle.

As in *Att.-Gen.* v. *Goddard* (1929) 98 L.J.K.B. 743, the secret profit in the present case was gained from the commission of criminal offences. The suppliant was a sergeant in the Royal Army

Medical Corps. He had escorted certain illegal but profitable lorry-loads through Cairo, shielding them from the suspicion and inspection of the local police by the uniform which he wore on these occasions. The court held that the small fortune he was paid for this work belonged to his employer, the Crown. The following were the bases for this decision :

(1) the suppliant had obtained the bribes directly by using his employer's property, the uniform and the ' intangible adjuncts ' of the King's uniform—' authority, prestige . . . a certain status and standing . . . facilities for imparting a veneer of officialism and legality to transactions which, without its imprimatur, would arouse suspicion ' (p. 71);

(2) in respect of the user of the uniform, a fiduciary relationship existed between servant and master which gave the master an equitable right to the bribes received. At this point, the comment should be interposed that a fiduciary relationship ' in the wide sense in which the term is used in the relevant cases ' (p. 71) seems to depend simply on the fact that the servant enriched himself in some way out of his employment when he should not have done so. The fiduciary relationship follows from the unjust enrichment, and appears, in these cases, to be no more than a verbal link between the fact of unjust enrichment and the concept of an equitable right upon which the master's remedy is founded in law;

(3) the Crown's remedy might further be rested upon an action for money had and received. The requisite, implied promise to pay was rendered a legal possibility by reasoning that, though ' an actual promise in advance of the event by A to B to pay over any bribe A might receive as the result of breaking the local criminal law would have been void for illegality, . . . an actual promise made by A, after he has, without B's knowledge or privity, received such a bribe, to pay it over to B, would not be void on this ground, and it is to that point of time . . . that the law refers the imputed promise '(p. 71).

The point taken by suppliant's counsel that the court will not imply the necessary promise ' where it involves a participation in the fruits of an illegal transaction ' (p. 70) was implicitly brushed aside. There was adequate authority for so doing, but one cannot help wondering at the paradox that, a man may not benefit from his own wrong, but he may from the wrong of his servant.

C. Grunfeld.

CONTRACT—DAMAGES

In *Victoria Laundry, Ltd.* v. *Newman Industries, Ltd.* [1949] 1 All E.R. 997, the Court of Appeal delivered a restatement of the rules in *Hadley* v. *Baxendale* (1854) 9 Ex. 341. It was only a formal restatement, which has in no way altered the substance of the law; but the six propositions (at pp. 1002–3) in which it is

couched do have the effect of sharpening the meaning of the original version of the law in the older case. For this reason, it is more than likely that, in future, the propositions in *Victoria Laundry* v. *Newman Industries, Ltd.*, rather than the rules in *Hadley* v. *Baxendale* will tend to be cited for the principles of remoteness of damage in contract.

At all events, this has been so in *Mason* v. *Burningham* [1949] 2 All E.R. 134, the first reported case involving ' remotenesss ' since the *Victoria Laundry* decision. The facts were simple : plaintiff purchased a second-hand typewriter from defendant for £20, and spent £11 10s. in having it overhauled. The machine turned out to be a stolen one, and plaintiff lost it. This action was for damages for breach of the implied warranty in the Sale of Goods Act, 1893, ' that the buyer shall have and enjoy quiet possession of the goods ' (s. 12 (2)).

As Lord Greene M.R. pointed out (at p. 144), disturbance by title paramount affords no defence to a contravention of section 12 (2). Accordingly, the sole question in issue was the measure of damages.

In the leading judgment, Singleton L.J. cited in aid (at p. 143) propositions three and four in the *Victoria Laundry Case*, which embody the first rule in *Hadley* v. *Baxendale* : ' (3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach. (4) For this purpose, knowledge " possessed " is of two kinds—one imputed, the other actual. Everyone, as a reasonable person, is taken to know the " ordinary course of things " and, consequently, what loss is liable to result from a breach of that ordinary course '. The purchase price was plainly a loss reasonably foreseeable by the seller; but was the cost of overhauling? The court found that, in overhauling the machine, plaintiff ' did " the ordinary and natural thing " [and] . . . what she did was " quite naturally " done and . . . it was " right and proper " '. Therefore, looking at the problem from the other side, the overhauling of the machine was reasonably foreseeable by the seller at the time of contract. Hence, the £11 10s. was payable as well.

C. Grunfeld.

THE INTERNATIONAL COURT OF JUSTICE

i. *The Corfu Channel Case* (Merits) (1949) I.C.J. Reports, 1949, p. 4.

On October 22, 1946, two British warships were mined while passing through that part of the Corfu Channel which lies in Albanian territorial waters. In November the Royal Navy swept those waters for mines. The ensuing dispute between Great Britain

and Albania was eventually referred to the International Court of Justice which had to consider Albania's responsibility for the explosions and the damage resulting therefrom, and also the legality of the British action in sending warships through the channel in October, and in sweeping it in November, on both occasions without Albanian consent.

Since there was no Albanian judge on the bench, Albania exercised her right under Article 31 of the Court's Statute and nominated Professor Ečer of Brno as judge *ad hoc*.

In view of the difficulty of obtaining eye-witnesses it was impossible to ascertain who had laid the mines. The United Kingdom contended that Albania herself was responsible, but offered no evidence on the point. She also maintained that the Albanians must have connived at the minelaying. The Court held that this point, too, had not been proved, and considered all the facts in order to ascertain whether Albania knew, or ought to have known, that mines had been laid in her territorial waters.

While the Court considered that the mere fact of territorial sovereignty is not sufficient to permit the inference that the territorial State knows, or even ought to know, everything that takes place on its territory, it was of opinion that ' by reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence '. The Court pointed out that Albania kept a close watch on the Corfu Channel, and this, coupled with the fact that Albania issued no notification of the presence of mines in her waters even after the British ships were mined, was held by a majority of eleven to five to show that Albania had knowledge of the minelaying and ' desired the circumstances of the operation to remain secret '.

Those in the minority on this point included the judges of Polish, Yugoslav and Soviet nationality, and the Albanian judge *ad hoc*. But it cannot be said that their political sympathies interfered with their judicial functions, for circumstantial evidence is, by its very nature, something that is open to more than one interpretation, and should only be used with caution, especially if the international responsibility of a State is involved. Judge Winiarski of Poland pointed out that, although there was insufficient evidence to show Albanian knowledge of the minelaying, by her actions after the explosions ' she seemed to remain indifferent to the grave breach of international law committed on her territory, and to the dangers to which shipping quite close to her shores was exposed. . . . Such an attitude on the part of the Albanian Government, . . . it would seem reasonable to hold, . . . can and must be considered as an independent ground for her responsibility '.

During the hearing it was contended on behalf of Albania that, since the *agrément* submitting the dispute to the Court did not

specifically ask the Court to assess damages, the Court could not do so. On this a majority of ten to six pointed out that the Security Council's recommendation to the parties to refer the matter to the Court (cf. 11 M.L.R. 483) envisaged a final decision, while Article 60 of the Court's Statute expressly declares that 'the judgment is final and without appeal'. Furthermore, in the *Chorzów Factory* (*Interpretation*) *Judgment*, 1927, the Permanent Court of International Justice had defined the purpose of a declaratory judgment as being 'to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned' (Series A, No. 13, p. 20). Since the amount of compensation due had not been argued, the assessment of damages was adjourned to a future date.

For Great Britain it was contended that the Corfu Channel was an international strait and that warships were entitled to pass through that part of it which lay in Albanian waters so long as the passage was innocent. Until recently it was believed that the innocence of a passage was judged by the littoral State (see, for example, Smith, *The Law and Custom of the Sea*, 1948, p. 32), but fourteen of the sixteen judges held, despite the fact that the purpose of the British passage in October was largely political, that it was for the Court 'to judge of the innocent character of the passage'. This it did by referring to all the facts of the case, the way in which the vessels were dressed, and, most important, the fact that they did not open fire after the explosions occurred. There was much discussion in this connection regarding the British Agent's refusal to submit to the Court an Admiralty order concerning observation of Albanian shore batteries. The majority declined to put an unfavourable construction on this, for, as Judge Ečer pointed out, although this 'gives rise to suspicions, . . . this is only an indication, and no proof, and it cannot rebut the presumption that Great Britain had quite legitimate intentions'. Only Judges Azevedo and Krylov considered that Great Britain had violated Albanian sovereignty in October.

All sixteen judges, including Sir Arnold McNair, considered Great Britain's action in sweeping the mines to have violated Albanian sovereignty. This was based on the fact that the Royal Navy acted without Albanian consent, and with an escort of war vessels out of proportion to the task in hand. Furthermore, the Court was not impressed by the argument that this action was necessary to secure the *corpora delicti*. 'The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most notorious abuses and such as cannot, whatever the present defects of international organisation, find a place in international law. Intervention is perhaps still less

admissible in the particular form it would take here, for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice '.

It would have been easy for the Court, in this case, to hold that warships always enjoy a right of innocent passage through territorial waters. This controversial issue was avoided. The existence of the channel as a geographical strait, the weight of traffic passing through, and its constituting part of the frontier between Albania and Greece, led the Court to ' the conclusion that the North Corfu Channel should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace '. It is submitted that the Court would have been on firmer ground if it had adopted the approach of Judge Krylov who pointed out ' that there is no such thing as a common regulation of the legal regime of straits. Every strait is regulated individually.' He referred to the fact that all the famous straits of the world are governed by international conventions, and ' if the regime of the strait is not defined by a multilateral convention, it appertains the coastal State or States to regulate it '. Such an approach is in accordance with international practice, and would not have affected Albania's liability for the mines, nor would it necessarily deprive the channel of its international status, although it might have required the Court to consider the question of a warship's right of innocent passage.

Leslie C. Green.

ii. *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) (1949) I.C.J. Reports 1949, p. 174.

After the murder of Count Bernadotte, the United Nations Mediator in Palestine, the General Assembly of the United Nations decided on December 3, 1948 to ask the International Court of Justice for an Advisory Opinion on the capacity of the United Nations to bring a claim against a *de facto* or a *de jure* government for reparation for damage (a) to the United Nations, and (b) to the victim or his representatives, in the event of an agent of the Organisation being injured in the performance of his duties in circumstances involving State responsibility. The Court was also asked how to reconcile the claim of the United Nations with that of the home State of the victim.

The Court based its Opinion on the assumption that ' As . . . the question assumes an injury suffered in such circumstances as to involve a State's responsibility, it must be supposed, for the purposes of this Opinion, that the damage results from a failure by the State to perform obligations of which the purpose is to protect the agents of the Organisation in the performance of their duties.

. . . ' From this premise it then proceeded to consider the capacity of the Organisation to bring an international claim. In order to decide this the Court had first to inquire whether the United Nations ' possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organisation possess international personality ? ' The Court recognised that this matter was not settled by the Charter and, therefore, examined the characteristics it was intended to give the Organisation by that instrument. Adopting a purely functional approach, the Court pointed out that many of the activities of the United Nations could only be conducted on the international plane, and the exercise of such functions ' can only be explained on the basis of the possession of a large measure of international personality. . . . Accordingly, the Court has come to the conclusion that the Organisation is an international person '.

This characterisation of the United Nations as an international person should terminate, once and for all, the arguments of those doctrinaires who assert that only States possess personality under international law. To say that the United Nations is an international person ' is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are those of a State. Still less is it the same thing as saying that it is a " super-State ". . . . What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims '.

Pursuing its functional approach, the Court pointed out that the Organisation could not carry out its functions ' if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices '. Since ' the Organisation has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its international obligations towards it ', the Court concluded unanimously that the United Nations possesses sufficient international personality to sue a Member for reparation done to it in the person of its agents, acting on its behalf.

The Court next considered the position of the non-member. Without examining any of the problems raised by the doctrine *pacta tertiis nec nocent nec prosunt* or by the Opinion of the Permanent Court of International Justice in the *Eastern Carelia Case*, 1923 (Series B, No. 5), the International Court of Justice declared unanimously ' that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them alone, together with capacity to bring international claims '. One may question whether the Court would have been of this opinion if one of the Great Powers

had been a non-member; for, as Professor Jessup points out, although the Covenant of the League of Nations and the Charter of the United Nations 'may be said to have created law in the sense that they laid down rules found acceptable to the majority of States, . . . in practice, thanks largely to the political fact of the non-membership of the United States, no attempt was made to develop the idea that non-members were bound by the Covenant' (*A Modern Law of Nations*, 1948, p. 134).

Although none of the judges found any difficulty in reaching the radical conclusion that the United Nations can sue a non-member, five refused to concur in the finding that the United Nations can sue for the injury to the victim. The dissenting judges maintained that in existing international law the right to bring an international claim on behalf of an individual belongs only to the State of which that victim is a national, for diplomatic protection depends upon the tie of nationality and in the absence of that tie no right to sue exists. Judge Krylov went further: 'still less is it possible to assert this right of the United Nations Organisation *vis-à-vis* non-member States. . . . It is true that non-member States cannot fail to recognise the existence of the United Nations as an objective fact. But, in order that they may be bound by a legal obligation to the Organisation, it is necessary that the latter should conclude a special agreement with these States'. If this is true of the right to sue in respect of the injury to the victim, it is difficult to understand why the situation is different in respect of the injury to the Organisation itself.

The majority agreed that, normally, protection depends on nationality, and that since the United Nations is not a State there can be no bond of nationality between it and its agents. They refused to argue by way of analogy from the concept of allegiance, but approached this problem, too, in a functional way. They pointed out that agents of the Organisation might be stateless and so unprotected by any State, while the national State of an agent might refuse to take up the claim of its national, and might even be the State responsible for the injury upon which the claim is based. In addition, it might happen that an injury to the agent might not justify the national State in bringing a claim, although the United Nations might be so justified. Since, 'under international law, the Organisation must be deemed to have the powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties', and since these duties are performed through the medium of agents whose independence must be beyond question, 'it becomes clear that the capacity of the Organisation to exercise *a measure of functional protection* of its agents arises by necessary intendment out of the Charter' (our italics). Having thus decided that the United Nations can sue for the injury suffered by its agent, the majority extended to the United Nations the

principles of the doctrine of the non-identity of State claims: 'In claiming reparation based on the injury suffered by its agent, the Organisation does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organisation'.

As regards the possible conflict between the right of the national State and the right of the United Nations, the majority adopted an unduly sanguine solution, for 'the Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense'. It is submitted that the approach adopted by Judge Azevedo in his separate but concurring opinion was more substantial. He pointed out that some agents are in a closer relationship with the United Nations than others, being appointed for their personal qualities rather than as the representatives of States. He adopted a similar reasoning to that employed in solving problems of dual nationality. In such cases the solution is found in the concept of overriding nationality. Judge Azevedo observed: 'in the case of officials or experts appointed directly by the Organisation, regardless of nationality, the Organisation will have a priority. . . . On the other hand, in the case of representatives of States Members, or even of experts having regard to their countries, . . . the main claim will conform to the principle of nationality'.

Perhaps the most important and valuable part of the Opinion is that concerning the functional protection of agents.

Leslie C. Green.

NOTES ON RECENT SCOTTISH DECISIONS

These notes do not refer to decisions of the House of Lords in Scottish appeals which have been reported in the *Law Reports* or in the *All England Reports*. The cases selected for comment have mainly been chosen to illustrate differences rather than similarities of approach to common problems by the Courts of Scotland and England.

Charities and Bequests.

A number of important decisions upon the construction of charitable bequests have lately been made by the Court of Session. It may be well to explain *in limine* that a Court of Seven Judges in Scotland has power to review all previous decisions of inferior tribunals or those of less numerous composition. Such a court has in *Angus's Executrix* v. *Batchan's Trs.*, 1949 S.L.T. 247, considered the validity of a testatrix's purported bequest of residue in a holograph will by the words 'All money after paying, please give to charities'. The testatrix appointed neither executor nor trustees. By a majority (the Lord Justice-Clerk and Lord Keith dissenting)

the Court held that the bequest must fail. Lord Jamieson, who shared the majority opinion, stated ' Where a power of selection among charities is not expressly or by implication conferred on nominated trustees personally, it may be exercised by assumed trustees, but not by trustees or a judicial factor appointed by the court '. This distinction was explained by his Lordship on the basis that some form of *delectus personae*, though not in the strict sense, arose even in the case of assumed trustees. A testator could reasonably expect his nominated trustees to assume persons whom they considered likely to carry out his wishes; but no such link would exist between the testator and a trustee or factor appointed by the Court. The Lord President based his concurrence with the majority upon ' a century of judicial pronouncements of high authority ', and swept aside arguments based on successive statutory expansions of the powers of trustees and executors nominate. ' The true question before us is not what a trustee or executor *can* do, but what a testator *must* do if he wishes to exercise the privilege of testation '. The dissenting opinion of the Lord Justice-Clerk is unlikely to be consigned to perpetual oblivion. Considering the matter both on principle and in the light of the authorities, he expressed the view that where, as in the case before him, the class of objects was sufficiently designated, and no question of *delectus personae* arose, it was in keeping with progressive trends in the development of the law of trusts that a selection of charities might be made by a judicial factor appointed by the Court, with quite as much justification as selection might be left to a trustee assumed under statute.

In *Rintoul's Trs.* v. *Rintoul*, 1949 S.L.T. 244, the Second Division held that a bequest of residue by a testator amongst ' whatever charitable or social institutions in Glasgow or elsewhere ' his trustees in their absolute discretion might think fit, was void from uncertainty. The word ' social ' was held not to be exegetical of the word ' charitable '. Passing reference was again made to *Chichester Diocesan Fund and Board of Finance* v. *Simpson* [1944] A.C. 341. This decision of the House of Lords in an English appeal had already in *Wink's Exors.* v. *Tallent*, 1947 S.C. 470, been presented, somewhat rashly it may be said, as a *brutum fulmen* at the First Division. In *Wink's Exors.* the bequest of residue had been to ' Societies or Institutions of a benevolent or charitable nature '; in the *Chichester Case* interpretation had concentrated on the words ' charitable or benevolent '. The First Division, following *Hay's Trs.* v. *Baillie*, 1908 S.C. 1224, held in *Wink's Exors*, that the two adjectives were used not disjunctively but exegetically of each other. The Lord President (Cooper) was at pains to dispose of counsel's suggestion that the *Chichester Case* should rule the interpretation. He pointed out that the law of trusts in Scotland and England had fundamentally distinct historical and doctrinal backgrounds, and

that, except for United Kingdom taxing statutes, the Scots lawyer is impenitently unversed in the English law of charities which is overshadowed by the Statute of Elizabeth (43 Eliz. c. 4).

An interesting question of alleged imposition of restraint on marriage in a bequest arose in the case of *Aird's Exors.* v. *Aird*, 1949 S.L.T. 151. A testator, who died in 1947, made a will in 1903, and bequeathed his estate to his brother. He qualified this bequest as follows: 'You, my brother James Aird I bequeath my all so long as you remain a single man. If you take unto yourself a wife, from that day I hereby give . . . to my mother . . . all my estate'. James Aird, who had married in 1906, claimed the bequest on the ground that the condition attached thereto was invalid as being in restraint of marriage. There was an elaborate citation of institutional and other authority at the Bar, and the maxim *matrimonia debent esse libera* was strenuously urged. The Lord President, in his opinion, commented that if the testator had died in 1904, when his brother James was still single, a different and difficult question would have arisen, but he continued in life until 1947. The will, which was by its very nature a private and undelivered document until the testator's death, was to be considered as operating as from that date, at which time James Aird was approaching the celebration of his golden wedding. It was thus hardly possible to maintain that he was being restrained from the free exercise of the choice whether to remain a bachelor or to marry. According to the plain intendment of the will, which came into operation in 1947, James Aird was disqualified from taking any benefit from the bequest.

Criminal Law.

A practical difference of highest importance between the law of Scotland and that of England is as to what amounts to sufficient evidence to establish *facta probanda*. Thus in Scotland the guilt of an accused person must be proved (except where statute specifically provides otherwise) by the testimony of two credible witnesses. As on the Continent, so in Scotland '*unus testis, nullus testis*'. This principle is illustrated by the case of *Bisset* v. *Anderson* (H.C.J., March 11, 1949), a very ordinary case of statutory crime. On appeal it was held that the uncorroborated evidence of an analyst was insufficient to warrant the conviction of a motorist on a charge of having commercial spirit in the tank of his car. It is provided by the Motor Spirit (Regulation) Act, 1948, s. 11, that an analyst's certificate 'shall be evidence' of the facts therein stated. Only had the Act provided that such evidence would be *sufficient* to warrant conviction would the burden of proof upon the prosecution be discharged in Scotland by the tendering of such certificate.

In *Dow* v. *Macknight*, 1949 J.C. 38, seven judges sitting in the High Court of Justiciary considered the question whether the

uncorroborated testimony of two or more *socii criminis*, if believed, was sufficient to support conviction. It was held by a majority that, though the evidence of *socii* must be received *cum nota*, and that this must be explained to the jury, such evidence would support conviction. The two leading opinions—by the Lord Justice-Clerk and by Lord Jamieson—gave full weight to the arguments of the Dean of Faculty for the appellant; but after a careful consideration of the authorities, concluded that, once the admissibility of a *socius* as a witness was conceded, the question of credibility was for the jury after an appropriate charge. The history of early exclusion and later admissibility of certain classes of witness was fully and accurately traced. The Lord Justice-Clerk showed the same clear grasp of the essential distinction between competency and weight of evidence as he showed in *Lennie* v. *Lennie* (discussed in ' Epithalamium—a Scottish Trilogy ', 12 M.L.R. 2, p. 162). One may recall, in considering the testimony of a *socius*, that in December, 1828, the notorious Hare saved his own neck by supplying the essential evidence to secure the conviction of his accomplice Burke.

An important restatement of the law regarding the inference to be drawn from possession of stolen goods was made by the Lord Justice-General (Cooper) in *Fox* v. *Patterson*, 1948 J.C. 104. A quotation from his Lordship's own opinion (at p. 108) summarises the matter. ' If the rule is to have full effect in shifting the onus from the prosecution to the accused and raising a presumption of guilt which the accused must redargue or fail, three conditions must concur—(a) that the stolen goods should be found in the possession of the accused; (b) that the interval between the theft of the goods and their discovery in the accused's possession should be short . . .; (c) that there should be " other criminative circumstances " over and above the bare fact of possession. If all these conditions are not present—if, for instance, the interval between the theft and the discovery is prolonged, or if the accused has only had temporary possession of the goods and has parted with them normally and openly—the facts which can be proved may well constitute ingredients (*quantum valeant*) in the case, and may combine with other factors to enable the Crown to establish guilt. But, unless all three conditions concur, the accused cannot be required to accept the full onus of positively excluding every element of guilt. Even when they concur, the weight of the resulting presumption, and the evidence required to elide it, will vary from case to case '.

Professor Orfield in his stimulating treatise ' Criminal Procedure from Arrest to Appeal ' (in the United States of America) has adverted (p. 64) to the clear rules which obtain in Scotland restricting the eliciting of information from suspected or accused persons. In England the Judges' Rules lay down (Rule 3) that ' persons in custody should not be questioned without the usual caution being first administered '. The different approach of the

Scottish criminal law was reaffirmed in *Wade* v. *Robertson*, 1948 J.C. 117. The appellant in this case was charged with theft of whisky. After he had been taken into custody, a police constable called at his lodgings, and took possession of a bottle of whisky which he found there. On returning to the police station the constable told the appellant of his investigations; showed him the bottle taken from the lodgings, and said, 'Well Wade, this is a bottle I have been given by your landlord. I am going to ask you a few questions which you don't have to answer unless you like. They may be used in evidence against you'. Without any question being asked the appellant went on to make an incriminating statement as to how the offence had been committed. On appeal this evidence was held to be clearly inadmissible, and the Lord Justice-Clerk (Thomson) commented as follows, '. . . once a prisoner has been taken into custody and been cautioned and charged and his answer, if any, to the caution and charge noted—after that, so far as investigating the particular charge in respect of which the man has been apprehended, the police are to all intents and purposes *functi*, and they are not entitled to question him with regard to that particular charge. . . . It is said in this case that the circumstances do not fall under this rule in respect that it was a voluntary statement and was not made in answer to interrogation. . . . It may be that . . . the appellant made his statement without any questions being asked, but there was a plain invitation to answer questions, and it seems to me that in these circumstances one cannot call this a "voluntary statement" in the proper sense of the word'.

The divergent attitudes of the Scottish and English criminal courts as to the proper view to be taken of examination by, and information communicated to, a police surgeon who examines a person suspected of an offence against section 15 of the Road Traffic Act, 1930, have already been given wide publicity. It may be sufficient to say that the Lord Chief Justice, Lord Goddard, in *R.* v. *Nowell* [1948] 1 All E.R. 794, seems to impute to the Bench which decided *Dumigan* v. *Brown* and *Reid* v. *Nixon*, 1948 J.C. 68 a pejorative interpretation of the functions of a police doctor. If the imputation was made, it must be through a misunderstanding of their Lordships' opinions.

Due possibly to the admirable tradition of restraint observed by those charged with the public duty of prosecution of crime in Scotland, some fifty years had to elapse from the passing of the Criminal Evidence Act, 1898, before the Justiciary Reports included a decision upon section 1 (*f*) of that Act. This subsection provides, *inter alia*, that an accused person may not be cross-examined to show his bad character, or as to his previous convictions, unless 'the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution'. The import of this language fell to be construed in

O'Hara v. *H.M. Advocate*, 1948 J.C. 90. The essential facts relevant to the appeal were as follows: O'Hara, the appellant, had been charged with breach of the peace and assault upon two police officers. To the charge of assault he had lodged in advance of trial (as the law of Scotland requires if a special defence is to be made) a special defence of provocation and self-defence. At the trial, the evidence upon which the Crown mainly relied was that of the two officers who were said to have been assaulted; and these same witnesses were cross-examined by counsel for the defence on the line that one of them had been under the influence of drink and had been the aggressor. Later the accused himself gave evidence to like effect, whereupon the Procurator-Fiscal asked, and obtained from the Sheriff leave to cross-examine the accused on his past record—which included three convictions for assault and five for breach of the peace. The jury convicted by a majority, and an appeal was brought against conviction on the ground that on a proper construction of the Criminal Evidence Act, 1898, s. 1 (*f*), cross-examination to show bad character should not have been allowed. Counsel for the appellant contended that the defence by its very nature necessarily involved the leading of evidence which reflected on the police witnesses; and that counsel for the defence was entitled to cross-examine Crown witnesses along these lines if such evidence was relevant to the issue, and was adduced for the sole purpose of establishing the facts and not with the ulterior motive of discrediting the witnesses.

There being no Scottish authority on the point, leading English decisions were cited as persuasive authority to the High Court of Justiciary, and these were carefully reviewed in the opinions of the Lord Justice-Clerk and of Lord Jamieson. The Lord Justice-Clerk dealt, *inter alia*, with the line of cases from *R.* v. *Marshall*, 63 J.P. 36 to *R.* v. *Turner* [1944] 1 K.B. 463; *Stirland* v. *D. P. P.* [1944] A.C. 315; and *R.* v. *Jenkins*, 31 Cr.App.R. 1. He contrasted the 'liberal view' as expressed in a dictum [1] of Viscount Simon L.C. in *Stirland* v. *D. P. P.* (*sup. cit.* at p. 327), and by Channell J. in *R.* v. *Preston* [1909] 1 K.B. 568 (at p. 575) with the stricter view taken in *R.* v. *Hudson* [1912] 2 K.B. 464,[2] and considered 'The net result seems to be that the Court of Criminal Appeal in England adheres to *Hudson* (*supra*) with certain modifications in cases of rape and subject to the discretionary powers of the presiding judge'. Regarding this compromise solution as

[1] 'An accused is not to be regarded as depriving himself of the protection of the section because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses': *R.* v. *Turner*.

[2] 'We think that the words of the section "unless the nature or conduct of the defence is such as to involve imputations" must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words "unnecessarily" or "unjustifiably" or "for purposes other than that of developing the defence" or other similar words.'

somewhat unsatisfactory, the Lord Justice-Clerk proceeded to construe the subsection, unhampered by previous Scottish authorities and diverging from the interpretation adopted in leading English decisions. On the construction of the word ' character ' his Lordship said, ' In virtue of subsection (*f*) (ii) the accused loses the statutory protection in two events—(a) if he seeks to establish his own good character, and (b) if the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. In the first of these instances " character " must mean character generally, and quite apart from the issue raised by the indictment. It seems natural, therefore, to read " character " in the latter part in the same sense as the general character of the prosecutor or the witnesses '. He then proceeded to distinguish possible cases into two broad categories. The first class comprises those cases where cross-examination of the Crown witnesses is restricted to what is necessary for the accused fairly to establish his defence to the indictment—albeit it involves an invitation to the jury to disbelieve the witnesses. In such cases the character of the accused is not put in issue. *Secus* in the second class, which comprises cases where the cross-examination attacks the *general* character of Crown witnesses. Even in the second class of case, however, though cross-examination of the accused as to his previous bad character is clearly competent, the fundamental consideration is a fair trial, and the judge has discretion to disallow such cross-examination if the fairness of the trial might be thereby prejudiced. On the particular facts before the court, the cross-examination fell within the first class, and did not put the appellant's character in issue. The position would have been otherwise had the defence sought to establish that the constable was from his general character and antecedents an unreliable witness or person of dissolute habits. Lord Jamieson, in the course of his judgment, referred with approval to Channell J.'s statement of the relevant principle in *R.* v. *Preston* (*sup. cit.*) and to the distinction drawn by Hamilton J. (as he then was) in *R.* v. *Westfall*, 7 Cr.App.Rep. 176 (at p. 179), between an attack on character going to credibility and questions put to elicit what occurred when the alleged crime was being committed.

T. B. Smith.

REVIEWS

DICEY'S CONFLICT OF LAWS. Sixth edition under the general editorship of J. H. C. MORRIS with specialist editors. [London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1949. cxxix and 912 pp. £4 10s.]

THE publication of a new edition of *Dicey* will be regarded as a great event by all those interested in or concerned with the Conflict of Laws. The fifth edition appeared in 1932. Over the seventeen years which have since passed a remarkable development of this branch of the law has taken place both in this country and abroad: Parliament has enacted a number of statutes bearing upon it; very many cases, some of them of fundamental significance, have come before the courts; no less than four textbooks have appeared, and numerous monographic studies have tried to elucidate specific problems. Outside England there has been an equally rich output in a field to which comparative research has always been essential.

In these circumstances it is not surprising that the preparation of a new edition proved to be a herculean task. Nobody could have discharged it better than Mr. J. H. C. Morris, to whose writings the Conflict of Laws owes so much, but even he found it necessary to share the work with seven collaborators, Messrs. Cowen, Cross, Kahn-Freund, Lipstein, Parry, Welsh and Wortley. The team work which has resulted and which is generously acknowledged in the preface, seems to have been a real success. It throws a significant light on the difficulties of this particular subject that 'responsibility for editorial policy belongs to the editors collectively, but not to any individual editor, since some of the decisions were only arrived at by a majority vote' and in at least one case, *i.e.*, the deletion of the chapter on Nationality, only by the general editor's casting vote.

It is not easy by way of a review to do justice to a work to which eight highly qualified experts have brought so much learning, thought and devotion. To describe the contents of the book would be a narrative full of platitudes. To look out for printing errors, omissions or other slips would be lacking in that spirit of humility which should animate a reviewer of this work. To discuss individual points and to agree or disagree with the editors' decision would be attractive for the reviewer, but disproportionate to the calibre of the editors' achievement. They are entitled to expect a broad approach and a generous appreciation of their labours and accomplishments.

This, in a sense, is really a fourth edition of Dicey's classical work. The intervening editions for which Professor A. B. Keith was responsible were in many directions open to criticism. The editors of the present edition have, on the whole, taken the third edition as a basis and brought it up to date. The result is a book which preserves the spirit of Dicey's genius, yet adapts it to modern conditions. What Dean Falconbridge expected from 'the skilled and enlightened editorship of Mr. J. H. C. Morris' has indeed been fully realised: a work of classical stature, exposed to the danger of growing stale, has been restored to freshness and vitality and thus been assured of retaining its pre-eminent position not only as a collection of material, but also as a guide to the law and its rational evolution. If an American scholar could, with some justification, speak of the 'Anglican positivism' of earlier editions, the keynote of the sixth edition lies in its measured progressiveness, mindful of tradition, yet searching for judicious adaptation and advance. *Dicey* has again become a book that not only informs but also inspires. Moreover, it has become a book that informs correctly and inspires wisely.

A few examples may serve to illustrate this characterisation. It is particularly striking in connection with the Chapter on Movables (pp. 557 to 578) which, as the italics in the Table of Principles and Rules make evident, has been almost completely re-written by Mr. Morris. Thus the question of the law governing the transfer of goods in transit was hardly mentioned in previous editions. The new *Dicey* suggests that where the *situs* is casual or unknown, a transfer valid by the *lex actus* will probably be recognised here, though this does not necessarily exclude the validity of a transfer according to the *lex situs* where this is appropriate. In connection with the assignment of intangible things the primacy of the proper law is now proclaimed and a clear distinction is drawn between the assignor-assignee and the assignee-debtor relationships. The treatment of the authorities which, on this point of great practical importance, are conflicting and particularly unsatisfactory, is interesting: they have by no means been ignored, but they are attractively explained and distinguished so that a courageous judge should not find it difficult to adopt what is unquestionably the only sensible principle. A certain amount of audacity however, will be required of non-academic lawyers, if they should feel inclined to adopt Mr. Morris's views on renvoi or on classification and the incidental question. On the former matter he gives many, though frequently somewhat mathematical reasons against the foreign-court theory, but he gives none for his final submission that the internal-law theory should prevail. On the latter points, completely omitted from the former editions and not referred to in the present edition's Table of Principles and Rules, Mr. Morris presents an exhaustive and interesting discussion, although it cannot easily be reconciled with the prevailing practice which does not support the editor's preference for what, on the whole, is characterisation in accordance with analytical jurisprudence and comparative law.

Dr. Kahn-Freund's chapters on Contracts (pp. 579 to 753) are not only the longest and, for the average practitioner, the crucial ones of the book, but also of outstanding merit. The finesse with which Dicey's great text has been handled is impressive. Reading between the lines one cannot help feeling, though one cannot prove, that Dr. Kahn-Freund would not have been disinclined to modify Dicey's subjective theory of the proper law as applied by the Privy Council in *Vita Foods Products* v. *Unus Shipping Co., Ltd.* [1939] A.C. 277, but the only point at which the printed word allows the cat out of the bag is where the rule as to capacity is being restated by suggesting that the law with which the contract is most closely connected should govern—a solution put forward with such absence of dogma that one is tempted in overlooking its heresy and also its inelegance in the context. On the other hand a real welcome should be extended to the new Rule 138 according to which the formation of a contract is governed by the proper law, and to the new formulation of Rule 140 which now attributes equal force to the *lex loci contractus* and the proper law in so far as formalities are concerned and to the thirty-five pages dealing with foreign currency obligations. The discussion of bills of exchange or of the law of agency will provide the careful reader with representative examples of the scholarly, yet predominantly practical approach which gives these chapters their mark.

Similar remarks apply to the contributions of Mr. Cross, who is responsible for the rules relating to jurisdiction in matrimonial affairs (pp. 216–268, 368–385) and the validity of marriage (pp. 758 *sqq.*), and of Mr. Welsh who deals with family relations (pp. 269–275, 480–520) and status (pp. 465–475). The former has done useful service by his treatment of the problem of polygamous marriages, by giving adequate space to the choice of law problem, by his minute examination of the decision of the Court of Appeal in *De Reneville* v. *De Reneville* [1948] P. 100 and, as some may think, by rejecting Professor Cheshire's view of the influence of the matrimonial home upon questions of capacity to marry. As to Mr. Welsh's chapters particular attention will have to be given to his criticism of *Re Bischoffsheim* [1948] Ch.

79, his thorough and systematic treatment of adoption and his departure from Dicey's suggestion that no status unknown to English law will be recognised here, to mention only a few matters illustrating Mr. Welsh's infusions into a text which has been carefully revised throughout.

When one comes to Dr. Lipstein's parts, one approaches the borders separating the new *Dicey* from the old, but in his case this is obviously due to the fact that many of his subjects, such as bankruptcy and the extra-territorial effect of English judgments and orders, do not lend themselves to radical experiments. Where Dr. Lipstein is left some elbow-room, he knows not only how to bring his text up to date, but also how to rejuvenate it. This is proved by his new chapter on quasi-contract and by his revision of the Introduction where, in particular, he has greatly improved the formulation of the vested rights theory: English courts enforce a right acquired under the law of a country *which is applicable according to the English Conflict of Laws*; somewhat surprisingly, the negative aspect is less clearly expressed by the formula that no right is enforced that has not been acquired 'in virtue of an English rule of the Conflict of Laws'. There cannot be many, however, who would have regretted the disappearance of the curious sentence (p. 15): 'England, France, Mexico, the United States, Turkey, Russia and India are civilised countries'. There is also an unfortunate incongruity between p. 18 where foreign penal, confiscatory and revenue legislation is stated to be outside the English court's power of enforcement, and p. 152 (Rule 22) where Professor Wortley says that the English courts will not enforce foreign penal, revenue or political laws, incidentally without gaining any real advantage from introducing the French notion of *lois politiques* into English law.

It was, no doubt, the nature of their subjects that has also to some extent precluded Messrs. Cowen, Parry and Wortley from making many alterations of a fundamental character. Thus, the rules relating to domicile are so well settled as to make it readily understandable that about the only major change effected by Mr. Cowen (and followed in the remainder of the book) consists in the substitution of 'domicile' for 'domicil' and in the rule that a corporation's domicile is in the country of its incorporation rather than in the country where its affairs are centred. Yet one cannot help feeling that there would sometimes have been greater scope for improvement. Rule 22 which, as mentioned above, deals with revenue laws and so forth and also with the Act of State is of the greatest importance in practice. The cursory character of the Comment can perhaps be explained, though not excused, by Professor Wortley's intention to produce at some future date a comprehensive work on the subject, particularly on Confiscation. The intimation (p. 157) that the House of Lords will perhaps 'reconsider the decision in *Princess Paley Olga* v. *Weisz* [1929] 1 K.B. 718, in the light of international law and foreign practice in the matter of confiscations', is hardly sufficient, especially if it is remembered that, with every justification, Mr. Morris relies on the same decision (p. 563) to prove the controlling influence of the *lex situs* on the acquisition of title to movables. Mr. Cowen's chapters on Torts (pp. 799–807) and Procedure (pp. 859–870) are very short. His rigid determination to limit himself to matters actually raised in the courts is not wholly in line with the rest of the book. In neither chapter has reference been made to *Yorke* v. *British and Continental Steamship Co., Ltd.* (1945) 78 Ll.L.R. 181. The question of the applicability of English law where foreign law has not been pleaded or proved, but obviously governs the case, would have merited more elaborate discussion than it receives at p. 867. It would also have been desirable, for instance, to deal with the division of functions between judge and expert in the light of such decisions as *Di Sora* v. *Phillips* (1863) 10 H.L.C. 640; *Hartmann* v. *Koenig* (1933) 50 T.L.R. 114 or *Re Parana Plantations, Ltd.* [1946] 2 All E.R. 214.

Dicey's sixth edition is by about 200 pages shorter than the fifth. This has been achieved by employing smaller type for the Illustrations and by

deleting the Appendices, the chapter on British Nationality (on which Mr. Parry will soon publish a separate book), most references to American cases and the short indication of the facts of a decision by which the earlier editions considerably facilitated the busy practitioner's research. Yet the sixth edition is the fuller and, indeed, incomparably the better one. It can be readily appreciated that, when they reached the end of their journey, Mr. Morris and his colleagues were reminded of Mr. Tangle in *Jarndyce* v. *Jarndyce,* and felt that they had read nothing else than *Dicey* since they left school (Preface, p. xvii). Let them be re-assured that, in the words of Mr. Kenge, their labours have taken 'their place in the stately vista of the pillars of our profession'—a comment which, it is certain, is more appropriate to Dicey's sixth edition than to the Cause of which Mr. Kenge spoke.

F. A. Mann.

Textbook of the English Conflict of Laws. By Clive M. Schmitthoff, ll.m.(Lond.), ll.d.(Berl.). Second Edition [Sir Isaac Pitman & Sons. 1948. xi and 461 pp. 35s.]

The second edition of this excellent textbook will enhance the reputation deservedly won by the first. The revision seems to have been most carefully carried out, and, despite the spate of new cases, some of great importance, Dr. Schmitthoff has succeeded in avoiding any substantial increase in size. His restraint in this respect is in contrast to the unbridled enthusiasm of Dr. Cheshire, whose book, though it becomes more learned and exhaustive with each new edition, has now grown beyond the grasp of the elementary students for whom it was originally intended. Happily this no longer matters for the gap is admirably filled by Dr. Schmitthoff, and now that Professor Graveson has published his introductory manual, students and teachers of Conflict are exceptionally fortunate in the range of textbooks available. At present it is the practitioner who is least well served, but the promised new edition of Dicey will doubtless meet his need and with its appearance this branch of the law should become the best documented of any. There will then no longer be any excuse for the abysmal ignorance of this subject formerly displayed by bench, bar, and solicitors and still, perhaps, sometimes discernible. Dr. Schmitthoff is not the least of the pioneers who have laboured to teach us better.

L. C. B. Gower.

Property, Wealth, Land. By Myres Smith McDougal and David Haber. [Michie Casebook Corporation, Charlottesville, Virginia. 1948. viii and 1213 pp. (with index).]

This is an excellent example of the new type of case-book which is coming into use in the U.S.A. That its authors are unconventional and provocative members of the unconventional and provocative Yale Law School is a guarantee that it is something out of the ordinary, and it would therefore be a mistake to form an estimate of the type and quality of the teaching in the great American law schools from a perusal of it. Nevertheless, it would not be unfair to say that it does indicate that these schools have a conception of their work, and of the kind of educated man and trained lawyer which a university law school should aim to produce which is altogether on a different plane of progress from the accepted standard in this country.

American law schools are of course often post-graduate so that the student should come to his work with a better apparatus than our students have. Yet even at the post-graduate stage few English teachers would contemplate an approach to their subject based on such a broad outlook and with such a majestic sweep as that evident in this book. An English law school aims to turn out graduates with a sound grasp of legal principle, an American law school (or the best of them at any rate) aims to turn out students with, in addition, a sound grasp of the structure and functioning of the society in which these principles have grown up, and have to be applied.

In the opening section of this book the authors propound over several pages a number of searching questions which they assert are raised by the study of the law of property, and in the light of which the materials for this case-book have been collected. A small selection from these will indicate the outlook of the authors better than any long description. 'What', they ask, 'are the basic similarities and differences in capitalist and socialist societies?' . . . 'What meanings do different people in different situations attach to the word property?' . . . 'By what specific practices and doctrines are resources allocated, planned, developed, and exploited in the United States today?' . . . 'Behind the formal façade of authority, what is the structure of real and effective control over important decisions about how resources are allocated, planned, developed, and exploited?' . . . 'Are present practises for the protection and regulation of private claims those best calculated to promote optimum production?'

Again, before we are introduced to any decided case we are treated to extracts from the article on property in the *Encyclopedia of Social Sciences*, to a section on 'private property' from the chapter on Economic Institutions of Capitalism, from Blodgett's, *Comparative Economic Systems*, to a paper on Soviet Property Law in Plan and Action, by Harold J. Berman, of the Stanford University Law School, and to the section on property from the Restatement of American Law. Then comes the *Robin's Dry Dock Case* to bring us up against the legal limitations on the property conception by means of a judgment from Justice Holmes emphasising that a charterer has no such right of property in the ship in which his goods are to be carried as to enable him to sue a ship repairer whose negligence has put the vessel out of commission and thereby deprived him of her use.

Part I of the book entitled 'Property and Wealth' is concerned with the general sociological background, and the principles of property law. Part II which extends to some three hundred pages is entitled 'Land (Resource) Allocation by Private Volition', and is concerned with transfer of property, conveyances, succession, landlord and tenant, and a number of miscellaneous methods of handling property so as, for example, to protect it against taxation, or insulate it against creditors. Part III which running to nearly eight hundred pages is by far the most substantial part of the work, is entitled 'Land Planning and Development'. The greatest part of this, *e.g.*, the chapter on Land Planning and Development by Private Agreement, is concerned with what we should regard as general property law and conveyancing, for example, the interesting sections on easements and the law relating to building estates which stems from our own equity decisions. It is brought in under the general head of planning because of the American conception of planning by free enterprise. It must be confessed that to the reviewer this is a conception of such modern origin that the attempt to fit the cases into it reminds him of the operation upon Procrustes. The material brought together, however, has its independent value, and is of great interest.

A good deal of this part of the book is taken up with what we should regard as local government law, but as is well known the development of town planning in the technical sense began earlier in the U.S.A. than in this country. Some States are of course very much ahead of others and while none of them have advanced so far as the Town and Country Planning Act, 1947, the

material collected in this book is indicative of a varied and fruitful experience to which too little attention has been paid on this side. One certainly gets the impression of a much greater degree of control over speculative building and individual idiosyncrasy than one's general conception of the American attitude would have led one to expect.

The American constitution, of course, raises obstacles to State planning and these increase in geometrical progression when regional or federal planning is contemplated. Yet regionally there is the outstanding achievement of the Tennessee Valley Authority to record, as well as interesting projects in New England and elsewhere. The material provided on federal and world planning though not without interest is naturally of a wishful and prophetic character.

In conclusion I will note two further points. In the first place the material is all refreshingly modern. Few of the cases given go back to the last century and the great mass of them date after the first world war, while quite an appreciable portion are later than the second world war. Secondly, as one would expect, both the bibliographies which are spread throughout the work, and the notes are characterised by width of outlook. The notes often pose questions of the interesting quality already exemplified, but more specifically directed to the problem under immediate discussion. The students in classes using this case-book, especially if they are taken by the authors, must have an interesting, stimulating, and at times bewildering experience.

C.

The Elementary Principles of Jurisprudence. By George W. Keeton. Second edition. [Pitman. xxxvi and 483 pp. 30s.]

Professor Keeton cannot, unlike many of his learned contemporaries, be accused of foisting upon an impecunious student public successive and little changed editions at too frequent intervals. It is eighteen years since the first edition of the book appeared: the new work is of much increased length and scope, taking account in particular of twentieth-century advance in the sociological, anthropological and comparative approaches to law. It is divided into three parts.

Part I is entitled 'The State and The Law'. Discussing the science of jurisprudence the author says (p. 3): 'Many different approaches are possible, and the selection of a particular one may depend upon training, equipment or even inherent belief in the efficacy of a particular technique'. The reference to inherent belief calls to mind Lord Macmillan's reflections on 'Two Ways of Thinking': it is not improbable that however much training and equipment may influence the inexperienced jurist in his approach, the choice between the manifold approaches open to the more learned and experienced is ultimately determined by temperamental inclination. Professor Keeton's conclusion that 'it may safely be predicted that whatever method of approach to Jurisprudence is eventually dominant in the legal thought of the present century it will not be Analytical Jurisprudence', must bring comfort to all who have found 'Salmond' a penance, whatever may be said as to its usefulness 'for the purpose of clearing the head'. The rise of the modern State and the problem of adapting to present conditions definitions of Sovereignty as illimitable and indivisible, are fully treated. So, too, are the sources of law—in particular the growth in England of *stare decisis* from the brusque 'it was wrong' to the unhappy 'much as we regret . . .'. Surprisingly there is no discussion of the relative merits of codified and case law systems, perhaps because friction on this point has, in the past, generated much heat and shed little light.

Part II deals with Some Fundamental Legal Conceptions. The Hohfeldian analysis is set out in all its complexity. Legal rights are classified, in the

following chapter, into positive and negative, legal and equitable, proprietary and personal, public and private, *in rem* and *in personam*. 'The distinction between rights *in rem* and rights *in personam* is to be found in the number of persons subject to the duty of respecting them' (p. 142). But the extreme examples given (ownership, and right to performance of a contract of service) do not sufficiently raise the problem encountered by Winfield in his attempt to define a tort as breach of a right *in rem* (*Province of the Law of Tort*, p. 237) though allusion is later made to this matter in a footnote (p. 386). Legal personality is fully discussed; it is questionable, however, if ten pages should have been devoted to a discussion of the corporation sole, available in almost identical form in *The Law Journal* for 1933. The chapter on Possession is excellently argued, and fortified with the most recent cases, civil and criminal.

Part III purports to deal with The Main Divisions and Problems of The Law. Professor Keeton accepts for this purpose a principal division of State Law into public and private, and into this framework he fits chapters on Constitutional, Administrative and Criminal Law on the public side; Family Law, Property Law, Contract and Quasi-Contract, Torts, Mercantile Law, Evidence, Procedure and Conflict of Laws on the private side. There is also an important chapter on International Law as distinct from State Law. It should be noted that Part III comprises more than half of the book and that it is a section of great interest. A student's Xmas stocking, it is full of good things. A few may be mentioned.

There is a very full discussion of Administrative Law which offers a decided, yet not immoderate, corrective to Dicey's mistrust of French droit administratif, and concludes with an account of American practice and theory leading to the Federal Administrative Procedure Act of 1946. The references to Chinese law which were prominent in the first edition are repeated, and the author suggests in relation to the 'eclipse' of *mens rea* that 'the tendency of Western systems to reproduce in the twentieth century some of the characteristics of Chinese law to which objection was taken in the nineteenth, indicates the extent of the change in social philosophy which has occurred in Europe during the past century' (p. 318). In the chapter on Mercantile Law much prominence is given to the continuity of merchant custom, and there is an excellent account of the growth and problems of the modern corporation in a society that has repudiated laisser-faire. Elsewhere Positivist Naturalist and Grotian theories of International Law are treated historically and an interesting parallel is drawn between world conditions in the time of Grotius and today. 'An established order has been broken down as it has done today. Then it was medieval Christendom: today it is Western liberal society' (p. 263). The achievement of Grotius was an International Law which was adapted to the sovereign State of the seventeenth century, which drew on ethical principle but not to the exclusion of unethical practice. But unless International lawyers are frankly to renounce all hope of repeating the achievement of Grotius among the States of the twentieth century—unless, that is, they consciously admit the limitation to a non-Communist world which is implicit in such works as Oppenheim and Brierly, and in Dr. Schwarzenberger's new work—they will have to investigate more closely than at present the Soviet attitude to International Law. Professor Keeton is aware of the difficulty but has little to say about it.

Two minor criticisms of this Part may be offered. Firstly, after noting that in the eighteenth and nineteenth centuries individualism favoured a theory of liability in tort based on intention and negligence, it is stated—'Today the pendulum has swung far in the other direction and if prevailing theories of social obligation continue it will swing further yet' (p. 390): *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330 is cited in support; *Read* v. *Lyons* [1947] A.C. 156 is ignored. Secondly, in the discussion of judicial precedent there is at p. 109 an account of *Donoghue* v. *Stevenson* [1932] A.C. 562, and

subsequent cases which occupies a page. It seems unnecessary to reproduce the account in full at p. 392.

However, the real difficulty is to comprehend the author's purpose in Part III. In introducing the divisions of this Part Professor Keeton notes the twin dangers—that discussion may be no more than an analysis of the general principles of one given legal system, or, alternatively, the study of some of the more difficult problems awaiting solution in English law. His answer to these dangers is that 'he may perhaps hope to indicate which difficulties arise from the nature of the problem itself and which are the consequence of historical development, and he may occasionally, by employing the comparative method, draw attention to methods of solution which have been employed in other systems' (p. 226). The student then may expect historical and comparative as well as contemporary and insular treatment of problems. But as in all Xmas stockings there are surprises. 'Historical treatment' is too often a euphemism for legal history; this history is well told, but it bulks large, and even Professor Keeton's partiality for the trust hardly explains a triple account of the development of the use (pp. 117–9, 142–3, 367–71). Moreover, adequate history is sometimes followed by very brief dismissal of modern problems. So the adventures of consideration at the hands of Lord Mansfield and the Report of the Law Revision Committee are noted, but there is little or no discussion of the desirability of consideration in a system of law. Again the chapter on Contract and Quasi-Contract devotes only one page to Quasi-Contract, and that a roll-call of the opposing camps: there is no reasoned statement of the differing principles of restitution and unjustified enrichment.

Comparative treatment in jurisprudential works is still very much a matter of grace and Professor Keeton has been generous. References to Chinese law have been commented on; Roman, French, Roman-Dutch and German law are called upon and the discoveries of Malinowski and Hogben utilised. Surprisingly, there is no comparative discussion of the trust—a note on its relation to the wakf and fideicommissa would be welcome in a future edition.

When all this is said it must be repeated that the book as a whole, and Part III in particular, is of great interest and wide scope. It is generally admitted that the Jurisprudential house is one of many mansions—many of these Professor Keeton has entered, and the length of stay is in the last analysis a matter of personal preference. Certainly the stay is never dull, and that to a student is a powerful attraction in an introduction to Jurisprudence.

G. D. G. Hall.

Towards a Realistic Jurisprudence. By Alf Ross, Professor of Law, jur.d., University of Copenhagen; ph.d., University of Upsala. [Copenhagen: Einer Munksgaard. 1946. 304 pp. Dan. cr. 18.]

'Law is conceived at the same time as an observable phenomenon in the world of facts, and as a binding norm in the world of morals or values, at the same time as physical and metaphysical, as empirical and *a priori*, as real and ideal, as something that exists and something that is valid, as a phenomenon and a proposition'. The book is an attempt to conquer this dualism and the author's solution is that we should 'interpret the ideas of a super-empirical validity as rationalisations of certain emotional experiences and thus include them in the world of facts'.

These extracts summarise the author's main thesis which he elaborates at considerable length and with great force. He deals first with the dualism as it appears in the concept of law and then as it appears in the doctrine of the sources of law; after a chapter on the dogmatism of subjective law,

obligations and rights as fundamentally technical legal concepts and the doctrine of real and personal rights are considered.

The meaning of realism in the author's phrase is perhaps best shown in his attitude to the American school, and, in particular, to Jerome Frank. In his view, they do not conquer the dualism but avoid it by choosing one of its components. Why, asks the author, do these realists call law only that which will be the future behaviour of *judges*? Why not also of engineers? This can only be because the judge has a *legal* competence, because the concept 'judgment' is a *legal* concept. 'The way', says the author, 'is to conquer dualism by showing that, rightly interpreted, it is not an expression of opposite and irreconcilable points of view, but symbolises different, actual, elements of the legal phenomenon'. His treatment of Kelsen is equally acute. The system of norms must, to be of jurisprudential value, be related in some way to social reality. Form and content are aspects of the same matter. 'But Kelsen's fundamental idea is precisely that of apprehending in the mere abstract "Sollen" form, a certain empirical *content* of reality as valid, which is an impossible crossing of form and content. . . . The concept of law requires a synthetic union, not merely an analytic combination, of reality and validity'.

The standard form of words is applicable here: it is impossible in the space of a short review to do more than indicate the author's position in outline. In one summarising sentence, he writes 'There do not exist any conceptions of validity whatever, but merely conceptually rationalised experiences of validity, that is to say, certain experiences furnished with peculiar illusions of objectivity'. Is there not this possible objection? The fact that my mind must come between myself and an aspect of validity—the fact that my experience of validity must be conceptually rationalised—does not necessarily mean that I am unable to conceive validity. This seems to lead to a further dualism between the I that is myself and to the I of whom I am rationally aware. Are we in truth dressed in the straitjacket of Cogito ergo sum?

The translator from the Danish writes English as good as is found in any book on jurisprudence. Double spacing of letters instead of italics does n o t assist the English reader.

J. A. G. Griffith.

World Revolution in the Cause of Peace. By Lionel Curtis. [Oxford : Blackwell. 167 pp. 7s. 6d.]

Mr. Lionel Curtis is one of the founding fathers of the Royal Institute of International Affairs (Chatham House); and has been for many years a protagonist of the federal idea in the British Commonwealth of Nations. Since the end of the Second World War, he has been a protagonist of a larger union on a federal basis, of the United States of the World; and if we cannot attain to that at once, then of the largest possible Western Union of democratic States. The peoples of the union should elect a parliament which would be responsible for the maintenance of peace and for external affairs of the member States. He writes with immense fervour and conviction; he knows how to make history eloquent; and finds inspiration in the origins of the United States of America.

His theme is simple; how we can bring about a political world revolution as the foundation of peace. The Philadelphia Convention of 1787, which turned the American Confederation into the Federal Republic of the United States, was the foundation of peace and prosperity of the North American Continent. He knows that chapter of history by heart, as it were; and he would apply the lessons of it to our harassed and troubled world which lives in fear of destruction by the rocket and the atom bomb, and cannot find in its present organisation the way to dissipate its fears. For Curtis the remedy is clear. If the peoples who have formed Western Union and others who are

like-minded would give up part of their national sovereignty, and would delegate Foreign Affairs and Defence to an International Government elected by the people, then they would have a sure defence against war. The functional organisation by way of economic union, which is the way of least resistance, is useless. The United Nations, which is formed on that basis, has already been found wanting. He writes with a bitter irony 'UNO is no more than an attempt to create a government based on a compact between sovereign States which merely defines in more precise terms the impotence of Government. Its title reveals the faith of its founders in the virtue of words—the United Nations, whose debates expose and accentuate disunion, the Security Council, the focus of danger to peace, and its record of failure, dated from Lake Success.'

The second part of the book describes the function of public opinion; and deals in detail with the growth of the movement for Western Union and a United Europe. It is a relatively dull section, containing long quotations from speeches and Hansard Reports of Parliamentary Debates. The third part sets out the essential features of the scheme; and is the most lively and the most constructive. He pleads for the summoning of an International Convention which is to draw up the Constitution of an International Government. Great Britain and the nations of the British Commonwealth must take their full part in it. He is confident that the International Government will be able to end the fear of war which is the key to all problems. It will control the oil fields of the Middle East and by so doing make it impossible for the Soviet Union to challenge the Western Powers. It would control the colonies of the participating nations. It would settle the political and economic problems of Western Germany. He assumes without argument that the Eastern Bloc would not dare to challenge a union comprising the United States of Europe, the British Commonwealth and the United States of America.

He is altogether opposed to the principle of the inevitability of gradualness. This creeping approach to International Union, which the British Government today appears to favour, is an illusion and we must boldly march to the Parliament of the World. To the objection that the Western States would be overwhelmed in such a Parliament by the Asiatic States with their much greater population, he replies that the representation of countries should be not according to the size of their population but according to their taxable capacity. Then the Western States would have a big lead. The division of function between international and national government would have the great advantage of liberating the national ministers for the work of social reform, which today they cannot tackle fully because of their pre-occupation with Foreign Policy and Defence. It would be another advantage that the electorate would vote freely and squarely about Foreign Policy, separately from their vote on Home Policy. Freedom is the crown which is offered if only we can carry through the revolution, as the representatives of the American States carried through their revolution at the end of the eighteenth century. And he quotes at the end the famous sonnet—

> 'We must be free or die, who speak the tongue
> That Shakespeare spoke; the faith and morals hold
> Which Milton held.'

Norman Bentwich.

The Gozawa Trial. Edited by C. Sleeman. War Crimes Trials Series. Vol. 3. [London: Hodge & Co. 1948. lxxii and 245 pp. 18s.]

In his Preface Lord Mountbatten explains that his policy with regard to trials for war crimes depended on prima facie evidence of brutality, and even then

only those persons were tried who were charged with offences likely to be punished by at least seven years' imprisonment. In accordance with this policy Lord Mountbatten selected the trial of Captain Gozawa and nine others as the first British war crimes trial in the Far East. The charges in this case were general brutality involving beating, lack of food, overwork and insufficient medical treatment; conspiracy to execute and executing a named Indian prisoner of war; and beating of prisoners so violently that eight unnamed Indians died as a result.

The defending officer in the *Gozawa Trial* was Lt.-Col. Sleeman, and he has edited the present volume. This trial took place in January, 1946, and only two months later we find the same officer prosecuting in what is known as the *Double Tenth Trial,* but a study of his activities in both trials shows his complete integrity in either capacity.

In his Introduction Mr. Sleeman explains why this particular trial was chosen as the first war crimes trial in the Far East. He points out that it coincided with the trial of Indian National Army officers in Delhi and was intended to show how the Japanese and their Indian collaborators really treated their Indian prisoners. He has made many references to the activities of the I.N.A., but seems to have based his comments on the report of a repatriated Indian officer which is printed as an appendix to *The Gozawa Trial.* It does not appear, however, as if the learned editor checked his information. An Indian civilian named Bhai Pritain Singh is mentioned—presumably this should be Giani Pritam Singh; Colonel Bhosle is really Colonel Bhonsle; while Rash Behari Bose was never described as Ras Behari Bose. Similarly, it is incorrect to include the executions carried out at Kranji (not Karanji) with those at Seletar and Bidadari, for the former was not a concentration camp. It is also unfortunate that in this connection he asserts that 'in most cases the medical officers were compelled to certify that these deaths had resulted from disease'. In the Kranji case at least, the medical record book of the camp was produced at the court-martial of the Indians responsible, and Major Hasan, the Indian medical officer at the camp, had entered in each case the nature of the bullet wound that had caused death. Furthermore, it is wrong to assert that after December, 1942, no violence was used in the recruitment of members for the I.N.A.

Since this trial was the first to be held in the South East Asia Command it is a little unfortunate that the tribunal sat without a judge advocate. It is true that no such officer was necessary as the President of the Court was a solicitor, and the judge advocate is only intended to advise what is usually a lay tribunal on the points of law involved in the case. When a judge advocate is sitting, however, he usually sums up the evidence before the court adjourns to consider the verdict. In this case there was no summing up, and it is impossible to ascertain why the court found as it did.

It is by now generally known among lawyers that the rules of evidence in war crimes trials are much more lax than they are in English law, and particularly is this so in connection with the admissibility of sworn depositions. In this case not one of the Indians who was alleged to have suffered ill-treatment at the hands of the accused gave evidence in person, and it was therefore impossible to discover how much of his deposition was truth and how much exaggeration, or the creation of an amalgam of incidents committed by a number of different Japanese and all rolled into one. In this connection, the defending officer made great use of the fact that the British officer who had taken statements from the accused was unable to recognise them from their photographs when giving evidence. He did not point out, however, that all the deponents had named their oppressors, nor that in the trial of the I.N.A. officers that had just ended at Delhi one of the accused, Gurbaksh Singh Dhillon, had been bearded at the time many of his treasonable acts were committed, but was clean-shaven at the time of his trial.

Depositions were used even in connection with the murder charge. The

accusation against one of the accused rested on the assertions of Indian eye-witnesses. The two Japanese facing this charge both denied that any Indians witnessed the execution. Since this evidence consisted solely of affidavits it was impossible to check whose memory was at fault. Nevertheless, on the strength of them, Lance-Corporal Chiba was sentenced to prison for seven years.

The most important legal considerations in this case were raised by the defence. In the first place, counsel alleged that since Japan had never ratified the Geneva Convention of 1929 relative to the treatment of prisoners of war, Japanese soldiers could not be charged with war crimes for failing to treat prisoners in accordance with its provisions. He never dealt adequately with the contention of the prosecutor that much of this convention was to be found in the rules of customary international law, and as such was binding on Japan. Nor did he take note of the prosecutor's reminder that Japan was a party to Hague Convention IV, 1907, and by Article 4 of the Regulations concerning Land Warfare attached to that Convention, prisoners of war must be humanely treated. During the trial Lt.-Col. Sleeman also ignored the fact that in February, 1942, the Japanese Government informed the Foreign Office that they would observe the terms of the Geneva Convention in respect of English, Canadian, Australian, New Zealand and Indian prisoners. This point was made by the prosecution and the learned editor has included the text of the communication in his Introduction to the volume.

Perhaps the most important problem of law involved was that concerning the status of the Indian troops who suffered the tortures with which the accused were charged. It was alleged by the defence that these Indians had ceased to be prisoners of war because they had volunteered as auxiliaries in the Japanese labour battalions, and as such were governed not by the law concerning prisoners, but by the Japanese military code concerning *Heihos*. This was an attempt to change the prima facie presumption of status possessed by the Indians and therefore the burden of proof clearly rested upon the defence. The prosecutor pointed out that after 1943 the Japanese announced that Indians would not in future be regarded as prisoners, but would be regarded as *Heihos* and part of the Japanese forces. This development was connected with the establishment of the 'Provisional Government of Free India' which declared war upon the Allies. Such an announcement by the Japanese was obviously not enough to change their status; what was needed was direct evidence of the voluntary nature of the change. This evidence the defence could not establish. Each of the accused asserted that he was aware that the Indians were *Heihos* and that the Indians regarded themselves as such, while Lieutenant Nakamura asserted that one of the Indian officers had informed him that the Indians had volunteered to work for the Japanese as *Heihos* and were prepared to go anywhere so long as they were not sent to the front. The Indian officer in question was one of those whose sworn deposition was admitted on behalf of the prosecution, but neither his, nor any of the other statements made any mention of this matter. It was impossible, therefore, for the defence to secure this evidence from the most reliable source, namely, the Indians themselves.

The Gozawa Trial makes it clear that there is much to be desired in the procedure adopted for war crimes trials. This procedure does not only apply in the Far East but also in Europe, for all British war crimes tribunals are established and their proceedings conducted in accordance with the Royal Warrant of June, 1945, concerning the Regulations for the Trial of War Criminals, which is printed as Appendix 2. Nevertheless, the transcript of this trial makes it perfectly clear that the accused, whatever the demerits of the procedure, received an absolutely fair trial and were sentenced in accordance with the evidence brought to the notice of the court. The importance of this becomes clear from the fact that apart from one acquittal and one death sentence, the accused received sentences of from two to twelve years and the

first have already been released. This must have an effect on the Japanese mentality, for Captain Gozawa agreed with the prosecutor that 'it would have been right for the President of this Court to condemn you to death on my word'.

L. C. Green.

Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928–1948. [Lake Success, United Nations; London: H.M.S.O. 1949. x and 1202 pp. 50s.]

In 1948 the United Nations published a collection of International Tax Agreements bringing up to date the similar series published by the League of Nations between 1928 and 1936. Now the Secretariat of the United Nations, at the request of the 'Little Assembly', has performed a similar task in connection with another facet of the League's publishing activities. In 1927 the Secretariat of the League published a study entitled *Arbitration and Security—Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security Deposited with the League of Nations.* This *Survey* has been brought up to date under a more general title, and the new volume contains the texts of all treaties or treaty provisions concerning the pacific settlement of international disputes entered into between 1928 and 1948. In order to make this new *Survey* as complete as possible, it includes not only treaties registered, in accordance with the relevant constituent instrument, with the Secretariat of the League of Nations or the United Nations, as the case may be, but even unratified treaties. Unlike the collection of International Tax Agreements already mentioned, a synoptic index has not been included, so that it is not possible from this volume to find the reference of any of the treaties included the League's *Survey.*

The first 327 pages of the new volume have been devoted to an analysis of the various treaties. Although 'the treaties for the pacific settlement of international disputes which were concluded between 1928 and 1948 do not conform to one general pattern', an attempt has been made to consolidate the study of these treaties by grouping them in accordance with the following divisions: basic types of treaties, that is to say, according to their purpose, whether that be judicial settlement, conciliation or arbitration; general jurisdictional clauses—many of the post-1928 treaties adopt the terminology of the Kellogg Pact and record the agreement of the parties that the settlement of disputes arising between them 'shall never be sought except by pacific means'; reservations, for there is hardly a treaty of any character, and those for pacific settlement are no exception, which does not include some escape clause, regardless of the sweeping character of its introductory sections—in fact, often, in order to estimate the correct worth of the obligations imposed by a treaty, it is more important to examine the escape clause than the clauses imposing positive obligations; disputes to be settled by special procedures, for not all States are parties to the Statute of the International Court of Justice, and not all those who are desire all their disputes to be settled by that court; and proceedings before national tribunals. The purpose of such clauses is not, generally speaking, to evade international settlement, but to delay it, by requiring the prior reference of the dispute to local judicial process. Frequently, however, such a clause is redundant, for whenever a dispute arises from a wrong done to a private citizen international law requires the exhaustion of local remedies before the matter is taken up by the individual's home State. Each of the 234 treaties dealt with in this *Survey* is analysed and its clauses allotted to the relevant headings.

In addition to analysing the various treaties according to their contents, the volume is also concerned in classifying the documents in accordance with the method of settlement used in each case, whether it be adjudication,

arbitration or conciliation. Finally, a survey is made of the various general provisions appearing in these treaties.

As a result of this *Survey* one is inclined to feel that even though the treaties for pacific settlement of international disputes 'do not conform to one general pattern', many of them do tend to conform to general underlying bases. A careful study of the texts here printed shows that, even though the phrases differ, the intentions of the parties to the treaties are the same, and it would not be very difficult, using the material provided in this *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928–1948,* to ascertain what may well be described as the standards of this field of treaty practice.

L. C. Green.

One Legal Aspect of the Polish Regained Territories. By M. Muszkat and others. [Warsaw: Polish National War Crimes Investigation Office. 1948. 29 pp.]

Les Problèmes de la Sauvegarde de la Paix et de la Liquidation des Suites de Guerre au Point de Vue du Droit Polonais. By A. Badkowski and others. [Poland: Publication No. 2 du Service Polonais pour la Recherche des Criminels de Guerre. 1947. 129 pp.]

In a recent article in *Soviet State and Law,* Mr. Vyshinsky made it clear that in Soviet eyes 'law is nothing without politics' and these Polish pamphlets suggest that Polish lawyers see problems in exactly the same way. The line of demarcation is so vague that at times it is impossible to know whether a legal or a political argument is being used. Thus, in the shorter of the two publications, there is an article devoted to providing statistical evidence to show that the former eastern provinces of Germany did not feed that country, and so there is no reason for them to be returned. In support of the legal argument put forward in that pamphlet, the so-called 'Cadogan Letter' of November 2, 1944, is printed. In that document Sir Alexander apparently said, on the authority of the Prime Minister, that 'HMG do consider that Poland should have the right to extend her territory to this extent', namely, the line of the Oder including the port of Stettin. The Polish lawyers argue that the Potsdam Conference made this transfer final, merely providing for formal recognition of the change at the German peace conference. Whether one agrees with this Polish interpretation or not is irrelevant, for in view of the mass transfer of population that has taken place in the area it will be difficult to re-establish the *status quo ante.*

The longer pamphlet is also concerned with Polish claims to the 'recovered' territories, but here we find the strange argument that, although in fact only Mr. Attlee, Mr. Truman and Marshal Stalin met at Potsdam, Poland was a party to the Potsdam Agreement which therefore cannot be amended without that country's consent. This is a dangerous argument for a country of eastern Europe to use, even if it had been a party to the Agreement in question, for it can only show that even eastern Europe recognises the weakness of its case in connection with the new Danube Convention.

Both pamphlets are based on the thesis that whereas international law was formerly founded on the principles of civil law, it now rests on principles of international penal law, which, it is asserted, was clearly established at Nuremberg. It is because of the penal character of law, and not out of any consideration of reparation, that Poland is entitled to retain the eastern provinces of Germany.

The larger pamphlet shows that Polish lawyers are fully aware that the Nuremberg Judgment did not make crimes against humanity criminal unless

they were part of a general war effort, in which case they are war crimes in the traditional sense. Polish law, however, recognises that certain offences should be considered as crimes against humanity even though they have been committed in time of peace, thus it is now considered criminal for any Pole to have been pro-German, or to have become a German, before the outbreak of hostilities when such acts were still legal by Polish law.

Perhaps the artificial character of the present Polish approach to problems of international law is best illustrated by the statement that the rise of the Soviet Union, the development of democracy in central Europe and the establishment of the United Nations have all contributed to hastening the destruction of the concept of sovereignty. This makes strange reading at a time when the Soviet Union and the 'peoples' democracies' of central and eastern Europe are more vehement in their assertions of national sovereignty than any other country in the world.

L. C. Green.

MacGillivray on Insurance Law. Third edition. By the Author and Denis Browne, M.A. [London: Sweet & Maxwell, Ltd. 1947. xcvii and 1567 pp. (with index). £7 7s. 0d. net.]

When Mr. MacGillivray, now one of His Majesty's Counsel, then a rather junior member of the outer bar produced the first edition of this book nearly forty years ago, it at once secured recognition as a leading textbook on its subject. The carefully edited second edition (1937), in his work on which the author had the distinguished assistance of Professor Denis Browne, definitely made it the leading authority on the general principles of insurance law. Those who know the solid scholarship of the authors would expect the new edition to maintain this honourable place, and it undoubtedly does so. The growth of the law in the interval has been so rapid as to require over one hundred pages of additional text, and this increase is perhaps even better shown by the table of cases and statutes which is now longer by fourteen pages. The new edition is accordingly very welcome.

The opening chapters on insurance companies contain a good deal of material which is general company law and of no special interest in insurance, though tucked away in the second of them we rather unexpectedly find a couple of pages on compulsory insurance against third party risks. The much expanded Chapter 3, on Industrial Insurance, would, we think, come better at the end of the volume. Although the statutory side of this subject is very important, the assurance does after all originate in a contract which has, generally speaking, to obey the ordinary rules which are given and explained in later chapters of the book. Unfortunately, substantial parts of this chapter are already incomplete because of the passing of the National Insurance Act, 1946, which must have occurred while the volume was in the press, but it is difficult to understand why there is no reference to it in the Preface, which does mention the Finance Act, 1947.

The following chapters which deal with general principles and problems of insurance law have not been much altered, but a short chapter on the General Rules of Construction has been added.

With Chapter 8 on Life Insurance we come to specialised contracts of insurance. There has been a good deal of reorganisation here involving substantial expansion. A new general chapter on Accident Policies, which were previously only dealt with in relation to the application of special clauses and conditions, has next been added. The chapter on Fire Insurance disappears in favour of a more general chapter on Property Insurance, which takes in a number of sections previously dealt with in the Clauses and Conditions chapter. The same remark applies to a new chapter on Third Party Risks. These rearrangements are undoubtedly wise, and improve the general arrangement of

the work substantially. Finally come chapters on Claims for Premiums and Stamp Duties.

The short section on Motor Vehicle Insurance strikes us as somewhat inadequate in view of the vast increase in the business of recent years, and of the important provisions in the Road Traffic Acts of 1930 and 1934, establishing the revolutionary principle of compulsory insurance. The practical problems raised by the avoidance of policies issued for the purpose of satisfying these Acts on such grounds as concealment, or breach of warranty, the Report of the Departmental Committee of the Board of Trade on the subject, and the remarkable agreement between the Insurance Companies and the Government in 1946, under which the companies have undertaken to see that all third parties, except voluntary passengers, who are injured in motor accidents, shall have the benefit of insurance, and have established the Motor Insurers' Bureau, are not discussed or referred to, though, no doubt, this latter arrangement was not finally concluded until this work was in the press.

In conclusion it is perhaps necessary to mention that the subject of Marine Insurance is not dealt with.

C.

A Study of Hospital Administration. By F. Hart and A. J. Waldegrave. Published under the auspices of the Institute of Public Administration. (Studies in Public Administration, No. 1). [London : Stevens & Sons, Ltd. 1948. ix and 188 pp. 15s.]

Vast numbers of people come into contact with hospitals every year and the contact is so close that in-patients at any rate have an opportunity of observing many aspects of hospital administration in detail. Even so, little of it is known to or understood by the general public and the authors are to be congratulated on having produced a comprehensive study of hospitals at work. Their aim has been to describe the administration of both voluntary and public authority hospitals as it was just before the National Health Service Act, 1946, came into operation, undoubtedly a suitable moment for stocktaking.

The book must be judged as what it is meant to be, that is to say not as a textbook nor as a searching analysis of hospital problems, but as a purely descriptive work. As such, it achieves its aim. The authors show what a hospital is like in practice and, to the present reviewer's mind, they manage to convey the authentic atmosphere.

The authors profess, however, to have written the book with an ulterior motive, *i.e.*, to provide material for the bodies whose task it is to carry out the transfer and re-organisation under the Act so as to enable them to make the fullest possible use of the experience gained by both types of hospital. Here it would seem that the purely descriptive method is not adequate and it is suggested that too little consideration has been given to the numerous and, in many cases, very intricate underlying problems. This is not meant to be a plea for the development of a philosophy of hospital administration—far from it—but a somewhat more profound analysis would have been helpful. For the same reason the authors give the impression of being perhaps too complacent. The reviewer has no wish to belittle the magnificent work done by British hospitals of all types and he realises that much of the criticism directed against hospitals is, and has been, ill-informed and unjustified. He thinks, however, that the more frequently repeated strictures might with advantage have been discussed and answered.

The style betrays the influence of contemporary Whitehallese and the book would have gained by being written in rather more colloquial English.

It is an unfortunate fact that such criticism as one may offer always tends

to take up a disproportionate part of one's space. This is so not because the review is meant to be mainly critical, but because the reviewer is tempted to make suggestions for the next edition. In the present case, what is wanted is not so much a new edition because the authors have described a state of affairs that has by now largely become history. It is to be hoped, however, that they will give us the continuation of the story, *i.e.*, the new system and the transition to it in practice. Whether this should be done in the form of an expanded edition of the present work or as a separate book must depend on the development to be discussed itself.

W. A. Steiner.

The Principles of Company Law. By J. Charlesworth, ll.d. Fifth Edition. [London : Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1949. xi and 344 pp. 15s. net.]

The new edition of this, the best shorter students' textbook on Company Law, has been thoroughly revised in the light of the Companies Act, 1948. It succeeds in summarising in 286 pages of text the complex law on this subject without submerging the principles in a welter of detailed rules, and is in general admirably clear. For the next edition, however, it is suggested that Dr. Charlesworth might reconsider his treatment of the various requirements that have to be fulfilled on making a public issue and of the prospectus provisions, since it is felt that these are made to appear more confusing than they really are. It is also suggested that the utility of the book would be increased if less attention were directed to the requirements on the formation of a *public* company, and if it were pointed out to the student that the present-day practice is not to form a public company in the first instance but to register a private company and convert it into a public one. The reasons for so doing also need stating as they are not necessarily self-evident to the student and are not emphasised in any of the textbooks.

Dr. Charlesworth may care to note the following examples of apparently erroneous or misleading statements which have crept in, doubtless owing to the speed with which the book was passed through the press: Page 35, penultimate sentence ('not' omitted?); Page 134, last sentence (effect of s. 436 ignored); Page 135, misleading penultimate sentence; Page 143, last sentence (effect of ss. 133 and 141 misstated); Page 144, first sentence (misleadingly suggests that special notice means twenty-eight days' notice *by* the company); Page 189, reference to s. 319 (should also be reference to s. 94?). The fact, however, that these are the only sentences to which exception is taken after a careful reading of the whole text, is a sufficient indication of the care with which the revision has been carried out.

L. C. B. Gower.

A Treatise of Contemporary Religious Jurisprudence. By I. H. Rubinstein, of the Illinois Bar. [Chicago : The Waldain Press. 1948. 120 pp.]

This study deals with the legal aspects of fortune telling, faith healing, and pacifism in war-time. The title of the book is perhaps somewhat surprising, since none of these matters can now be said to attract the attention of the law as 'wrongs against God and Religion', and, until reminded (by a footnote on p. 23) of the First Amendment to the American Constitution, the English reader may wonder what possible logical connection there might be between the three topics. But since literature on all three is extremely scanty

and the problems involved are interesting and important, gratitude to Mr. Rubinstein for having undertaken to deal with them systematically might well have outweighed such little blemishes.

Unfortunately, this treatise fails to deal exhaustively, or even adequately, with any of the three subjects. There is, of course, a lot of incidental information about American law which is useful to the English reader. Faith healing is not a subject of any great practical importance to lawyers or medical men in this country, but from Mr. Rubinstein's book we learn that the Medical Practice Acts of the various States of the Union, on which the main burden of dealing with quacks and faith-healers falls, differ in essential points from our Medical Acts. In the United States, these Acts are designed to protect the public against 'being treated in their physical ailments and diseases by persons who have not adequate or proper training, education or qualifications to treat them'; the right to undertake treatment of disease depends on the possession of reasonable qualifications. In this country, by contrast, the Medical Acts do not prohibit anyone from practising medicine or surgery, but see to it only that those requiring medical aid should distinguish the qualified from the unqualified practitioner.

Again, in the chapter dealing with Pacifism, one notes that draft classification of conscientious objectors under the Federal Draft Act, 1940, is subject to judicial review in subsequent criminal proceedings for failure to comply with an order of the draft board (which corresponds to our c.o. tribunal). As is known, no determination of a local tribunal or the appeal tribunal made for the purpose of the 1939 National Service Act could be called in question in any court of law here.

As a textbook of law Mr. Rubinstein's work falls short of the most modest requirements. The author has collected nearly 1,000 cases decided by courts in the United States, Great Britain and the Dominions, but he has so inexplicably mixed them up that it is difficult to avoid the impression that he considers the law to be the same wherever the English language is spoken. For this reason alone it is to be wished that the author had confined himself to the law of the United States or, better still, of his native State of Illinois. As it is, it becomes practically impossible to discover what exactly the law is with regard to any question either in Illinois or anywhere else.

Thus, in the discussion of fortune telling, we learn that in the United States this is a matter reserved for State legislation, but owing to the author's reluctance to quote even only one typical specimen of such a statute in force in any one State, the reader is left where he was before, namely, with the knowledge that it is desirable to repress such attempts to impose on a gullible public and that this is done in some places strictly and in others hardly at all. Some American States or municipalities indeed, so far from suppressing fortune telling, have apparently established an elaborate system of licensing the profession, based on payment of licence fees and residential qualifications. A similar attempt to institute licensed spiritualists and/or fortune tellers in this country in 1930–1 did fortunately not come off.

A few illustrations, mainly involving English law, may serve to show the magnitude of the inaccuracies and omissions for which this work is conspicuous. The author refers to the Witchcraft Act, 1735, s. 4 (the year is given as 1736) which is rarely invoked in English courts, but omits all reference to the Vagrancy Act, 1824, s. 4, under which the police now deal with fortune tellers. *Stonehouse* v. *Masson* [1921] 2 K.B. 818, which finally established that mens rea is not essential for conviction under section 4 and that, therefore, the defendant's genuine belief in his own powers is irrelevant, is quoted for the proposition that lack of specific intent to deceive is no defence in prosecutions for fortune telling (p. 19), but the author does not seem to notice that omission of all reference to the 1824 Act makes nonsense of the whole thing. On p. 78 we read: 'An action can be maintained against a Christian Science Practitioner for fraud by relatives of the deceased patient who was defrauded

by the practitioner'. That seems obvious, but looking at the facts of the New Jersey case of *Christian* v. *Canfield* (1931) 108 N.J.Eq. 547; 155 Atl. 788, which is quoted at length in support, we find that they are reminiscent of *Morley* v. *Loughnan* [1893] 1 Ch. 736, and that the action was brought not for fraud, but under the (equitable) doctrine of undue influence. In the third chapter, dealing with conscientious objectors, Mr. Rubenstein propounds the astonishing doctrine that 'a private employer . . . may discharge an adult or minor employee who registers as a conscientious objector and has been classified as such by the local draft board *upon the ground that, as a pacifist, he is an undesirable employee*' (italics mine). No United States authority of any kind is quoted for this proposition; the only two cases relied on are *Newell* v. *Gillingham Corporation* [1941] 1 All E.R. 552, and *Downsborough* v. *Huddersfield Industrial Society* [1942] 1 K.B. 145, of which the first did not deal with the question at all and the second decided nothing of the sort.

Hardly better authority is given for the author's assertion that, on account of their opinions, Christian Scientists can recover 'little or no' damages for personal injuries, mental anguish, pain and suffering; an assertion which is quite illegitimately fathered on the Texas Court of Civil Appeals in *Fort Worth and Denver City Ry.* v. *Travis* (1907) 45 Tex.C.A. 117; 99 S.W. 1141. From this and similar instances the reader may incline to the view that the author of this treatise draws, with a certain amount of glee, the most illiberal conclusions from dicta in the reported cases and uses his book to set them up as principles of law.

Perhaps it is as well that there is no Index of Statutes and/or Cases.

H. A. Hammelmann.

The Law of Smoke Nuisances. By W. R. Hornby Steer, m.a., ll.b., f.r.san.i., Recorder of South Molton. Second Edition. [London : The National Smoke Abatement Society. 1948. 72 pp. 3s.]

This little book, published by the National Smoke Abatement Society, is a convenient collection of the statutory provisions relating to nuisance by smoke. As appears from the interesting short history of the subject, smoke given off from the burning of coal was found to be a nuisance as early as the end of the thirteenth century, but it was not until the nineteenth century that the subject was seriously taken in hand by the Legislature, when the Town Improvement Clauses Act, 1847, contained a provision that furnaces used in factories should be constructed so as to consume their own smoke. The modern statutory provisions, contained in the Public Health Act, 1936, the Public Health (London) Act, 1936, and the City of London (Various Powers) Act, 1946, are set out in the Appendix. There is also printed the relevant sections of the Manchester Corporation Act, 1946, which go much further than any other statutory provisions in dealing with smoke nuisance. This Act provides that in the central area of the City (defined in the Act) no smoke shall be emitted from any premises; and also that this prohibition may be extended to any other area in the City on an order being made by the Corporation and confirmed by the Minister. It also prohibits the installation in a building of any furnace for steam raising or for any manufacturing or trade purpose unless the furnace, as far as practicable, can be operated continuously without emitting smoke.

The author sets out his subject concisely and clearly, so that this edition should be welcomed by all those who are interested in the subject of smoke pollution.

J. C.

Housing Subsidies and Rents. By J. R. Jarmain, m.a.(Admin.). Studies in Public Administration, No. 2. [London: Stevens & Sons, Ltd. 1948. viii and 294 pp. 25s.]

One has the impression that more has been written about local government in the last four years than in any similar period before the war. Several descriptive surveys have been offered for the enlightenment of the elusive John Citizen. New editions of older works have lamented the decline of local government. The Report of the Local Government Boundary Commission for 1947 has stimulated a lively controversy. On the other hand, monographs covering a narrower field have been less prolific. Mr. Jarmain's book is a valuable addition to this last group. Most of it was written immediately before the war, when the author was a member of the Economics Research Section of Manchester University. This does not mean that it is out of date; the problems he discusses are still with us. It is questionable, for example, whether the present system of housing subsidies to local authorities is the best that can be devised. There is a good deal to be said in favour of subsidising needy tenants rather than houses. Major difficulties still arise in valuing council houses for rating purposes, in fixing their rentals and in attempting to relate rentals to the ability of individual tenants to pay. Mr. Jarmain's analysis of these and other cognate matters is interspersed with statistical tables, most of which have been compiled on the basis of information supplied by a hundred local authorities. If this mass of detail detracts somewhat from the readability of the book, it enhances its value as a work of reference and as a contribution to the solution of the problems it poses. It deserves the close attention of economists, students of public administration, and, above all, everyone who is directly concerned with the housing and financial administration of local authorities.

S. A. de Smith.

Compulsory Purchase and Compensation. By R. D. Stewart Brown. *Current Law Guide*, No. 6. [London: Stevens & Sons, Ltd., Sweet & Maxwell, Ltd. 1948. vi and 97 pp. 6s. 6d.]

It is most difficult for the non-specialist to obtain a clear picture of the law relating to compulsory acquisition and compensation. Although much of the law is now to be found in the Acquisition of Land (Authorisation Procedure) Act, 1946, and the Town and Country Planning Act, 1947, a large number of very recent Acts (not to mention the Lands Clauses Consolidation Act, 1845) must be considered. In order to complete his jigsaw puzzle Mr. Stewart Brown must have had to hunt for most of the pieces, but his search was conspicuously successful. Those who bestow monthly benedictions upon the publishers of *Current Law* may be inclined to add an extra one after reading this excellent booklet.

S. A. de Smith.

Town and Country Planning Law. By J. Kekwick and Robert S. W. Pollard. ('This is the Law' Series.) [London: Stevens & Sons, Ltd. 1948. 103 pp. and (Appendices) 6 pp. and (index) 17 pp. 4s.]

The Town and Country Planning Act, 1947, has certainly met with its fair share of publicity and with a determination that its consequences shall be generally

known both in order to warn of dangers and abate fears. The present book, coming as it does in the series *This is the Law,* is a further attempt to bring the Act to every man's door. The difficulties of the attempt are obvious, while there is still hot argument on meanings it may be dangerous to lay down principles with broad simplicity, yet here a lesser adherence to the wording and order of the Act would have been helpful to a general reader. Many of the definitions, for example, with some explanation of them which now appear under 'Miscellaneous' could with advantage have been written back into the chapter on Development. Although at times expansion would have been useful, *e.g.,* as the circumstances when the speedy acquisition procedure is available, the book is a useful and accurate guide to the Act and in reading it the ordinary citizen will be made aware of matters vital to his pocket where ignorance might be expensive.

J. D. B. Mitchell.

Town and Country Planning Act, 1947. By R. L. Doble, m.a., and H. Mann, m.b.e., ll.b. Second Edition. [London : Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 1948. vii and 120 pp. 6s. 6d. net.]

This book is No. 2 of the *Current Law Guides* and is written by two solicitors engaged in local government work. Exposition of statutes can easily make dull reading and this is especially true when, due to the shortness of time between the operative date of the Act and the writing of the book, case-law is almost non-existent. The present volume is an exception; it reads well and easily; the analysis is clear and the sense conveyed without a textual reproduction of the Act which for most of its readers would be superfluous. A new art is developing—the presentation of the law as a combination of statute and statutory instrument. Because of the necessity for such a presentation, books like this will be more and more required. Unfortunately, nothing proliferates like paper, and new editions may become more frequent. For this reason, we hope that the publishers will be able to keep the price to its present reasonable figure.

J. A. G. Griffith.

The Story of the Lynskey Tribunal. By Wilfrid March. [London : Alvin Redman, Ltd. 1949. 139 pp. 2s. 6d. net.]

'Scotland Yard on the Track'; 'The Sword is Poised'; 'The Indiscretions of a Minister'; 'Walls have Ears'; 'The Case of the Cement Bags'. Edgar Wallace would have scorned such chapter headings. But if Edgar Wallace had told such a story, he would have been instructed that while truth may be knocked about a little, it must be kept on its feet. Chesterton took verisimilitude to its furthest frontier; but the man who was Thursday was, for all his balloonings, a troglodyte compared with (to quote another chapter heading) 'The Amazing Mr. Stanley'.

Evidence given by a large number of witnesses in succession does not easily lead to one comprehensible story, and it is the function of anyone writing an account of a case to enable the reader to see the whole. Mr. March attempts this but does not altogether succeed. A word must be said about the desirability of a book of this kind. The author is a journalist; moreover, he writes racy journalese. It has been suggested by journalists and others that the glamourising of Stanley was unworthy of the profession. This may be, but if so, much of the material printed by our

dailies is equally unworthy. While Mr. March attempts to present his story in the form of a novelette, it should be stated that he does not attempt to establish the principal character as a romantic merchant adventurer, old style or new.

J. A. G. Griffith.

Publications received :—

The Local and Personal Acts of 1948 and the Statutory Orders of 1948. [H.M. Stationery Office. 2s. 6d.]

Mayne on Damages. Eleventh Edition. First Supplement. By Peter Allsop, m.a. [Sweet & Maxwell, Ltd. 3s. 6d.]

Chitty's Treatise on the Law of Contracts. Twentieth Edition. Second Cumulative Supplement. By Barry Chedlow. [Sweet & Maxwell, Ltd.]

Clerk and Lindsell on the Law of Torts. Tenth Edition. Second Cumulative Supplement. By Barry Chedlow. [Sweet & Maxwell, Ltd.]

Police Problems of Today. By Sir Harold Scott, k.c.b., k.b.e. [Stevens. 2s. 6d.]

La Vie Juridique en Grèce dans les Publications Parues de 1945 à 1947. Georges Ténékidis.

Labour Courts in Latin America. I.L.O. [Geneva. 1949. 3s. 9d.]

Motor Claims Cases. Second Cumulative Supplement to First Edition. By Leonard Bingham. [Butterworth & Co. (Publishers), Ltd. 10s. 6d.]

Rivista Di Diritto Aeronautico. Number 2. [Roma.]

Guide to National Insurance. By H. Keast. [The Thames Bank Publishing Co., Ltd. 2s.]

Revista De Derecho Publicho. Number 1. Universidad Nacional de Tucumán.

Revista del Instituto de Derecho Civil. Nos. 1 and 2. Universidad Nacional de Tucumán.

Dissidios Coletivos Do Traballio. Geraldo Bezerra de Menezes. [Rio de Janeiro.]

The Great Assize. By J. H. Morgan, k.c. [John Murray, Albemarle-st., W.1. 2s.]

Commento A Toqueville. Gino Gorla. [Milano. Dott. A. Giuffrè.]

Lo Scioglimento Delle Assemblee Parlamentari. Giuseppe Guarino. [Napoli: Dott. Eugenio Jovene.]

Stein-Jonas' Kommentar zur Zivilprozessordnung. Part 3. Seventeenth Edition. By Adolf Schönke. [Verlag : J. C. B. Mohr (Paul Siebeck). Tübingen.]

Principles and Digest of the Law of Evidence. Third Edition. By M. Monir. [The University Book Agency, Allahabad. Rs. 35.]

CORRIGENDUM

Professor G. C. Cheshire's recent book, *International Contracts*, was described in a review at p. 263 of this Volume as having been delivered as one of the annual Gilbert Murray lectures in the University of Glasgow. We are informed that these lectures were in fact founded in honour of the late Dr. David Murray, the eminent Scottish historian and lawyer.

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Topham (ed.): Palmer's Company Law (18th ed.)
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Lawson: Three Lectures on the Companies Act, 1947
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